No. 261

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

JOHN T. WATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The judgment and sentence of the District Court are not reported; they appear on pages 17 and 18 of the record. The majority and dissenting opinions of the Court of Appeals are reported at 233 F. 2d 681 (R. 175, 185).

Jurisdiction

The initial opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit re-

versing the judgment of conviction were entered on January 26, 1956. After rehearing *en banc*, the initial opinion and judgment of the Court of Appeals were reversed on April 23, 1956, and an opinion and judgment were entered affirming the conviction (R. 175, 199). Petitioner's timely petition for rehearing was denied on May 22, 1956 (R. 200). On May 31, 1956, Mr. Chief Justice Warren entered an order extending the time within which a petition for certiorari might be filed until July 20, 1956 (R. 200). The petition for a writ of certiorari was filed on July 19, 1956, and was granted on October 8, 1956 (R. 201). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner appeared in response to a subpoena and testified fully before the Committee on Un-American Activities of the House of Representatives concerning his own past activities in the Communist movement. He refused to answer certain questions of the Committee relating to the identification of a number of individuals alleged to have been members of the Communist Party some ten years before. Thereafter he was cited for contempt and convicted of violating 2 U.S.C. § 192 by his refusal to answer. The questions presented are:

1. Does the Committee on Un-American Activities have a separate and distinct power under the Constitution to engage in the exposure of individuals as distinguished from its limited power to engage in such exposure as may be ancillary and incidental to its legislative activities?

2. If the Committee has no such separate and distinct power to engage in the exposure of individuals, was the questioning of petitioner, in the circumstances of this case and in light of the Committee's repeated

assertions of a separate and distinct power of exposure, an exercise of its asserted function of exposure and therefore beyond the constitutional authority of the Committee?

3. Does the First Amendment to the Constitution of the United States protect against forced disclosure of one's past political associations under the circumstances of this case?

4. Is 2 U.S.C. § 192, read together with the authorization of the Committee on Un-American Activities, so vague and indefinite as to violate the due process clause of the Fifth Amendment to the Constitution of the United States?

5. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

Statutes Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

"Refusal of witness to testify.

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any ques-

tion pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) provides in relevant part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"Rule XI

"*Powers & Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

. . . . . .

"(q)(1) Committee on Un-American Activities.

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Statement

John T. Watkins, petitioner herein, resides in Rock Island, Illinois (R. 71). He has been an organizer for the United Automobile Workers since August 1953 (R. 72). Prior to that time he had been employed by other labor organizations (R. 72), including the Farm Equipment Workers; in 1947 he had led the battle against the Communist faction in that union for compliance with the Taft-Hartley Act (R. 75).

Petitioner was named as a member of the Communist Party in the period 1943-1946 by one Donald O. Spencer, who testified before the Committee on Un-American Activities [1] in a hearing in Chicago in September 1952 (R. 73, 154). Petitioner was not called to testify before the Committee at that time.

Petitioner was identified again as a member of the Communist Party in the early 1940s (R. 33-34, 136) when Walter Rumsey appeared before the Committee in March 1954. Thereafter petitioner was subpoenaed to appear, and on April 29, 1954, did appear, before the Committee (R. 70). The Chairman of the Committee opened the session at which petitioner testified with the statement that "the hearing this morning is a continuation of the hearings which were held in Chicago recently. . . ." (R. 70). At these earlier hearings, to which the Chairman referred, he had made a formal opening statement (R. 43-44), describing the Committee's activities and referring generally to various past legislation and pending bills before the Committee.[2]

Prior to his appearance, petitioner had prepared a respectful and courteous written statement that he would tell

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[1] The Committee on Un-American Activities of the House of Representatives will generally be referred to throughout this brief as "the Committee."

[2] The content of this opening statement and its significance, or absence of significance, are discussed fully, *infra* pp. 71-76.

the Committee all about himself but would not inform on past associates no longer connected with the Communist movement (R. 40, 85). He was prepared to, and did, answer all questions about himself. He frankly admitted cooperating with the Communist Party from 1942 to 1947 and willingly answered the few questions put to him about the extent of his cooperation with the Party (R. 75-77). He categorically denied past or present membership in the Communist Party; he reiterated those denials with respect to the details of both Spencer's and Rumsey's testimony about himself (R. 73, 75, 82-84).

Petitioner was entitled to claim the privilege against self-incrimination for all his testimony concerning Communist Party membership, cooperation and associates. *Blau* v. *United States*, 340 U.S. [illegible]; *Emspak* v. *United States*, 349 U.S. 190. But he was as unwilling to use this solution to his problem as he was to inform on past associates. At the appropriate point in the hearing, he read the Committee his prepared statement as follows (R. 85):

> "I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowl-

edge and belief have long since removed themselves from the Communist movement.

"I do not believe that such questions are relevant to the work of this committee *nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities.* I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates." (Emphasis supplied.)

Petitioner adhered to the position taken in his prepared statement in responding to the Committee's questioning. He declined to state whether or not a list of 29 persons, who had been named by Rumsey (and in most instances by Spencer also), had been known by him to be members of the Communist Party; significantly, in the one case where he believed the man still to be a member of the Party, petitioner interrupted this series of questions and answers to respond affirmatively with respect to Joseph Stern, whom he described as "carrying on Communist Party activities" in the Quad City area (R. 90).[3]

The Committee questioned him no further after his refusal to answer concerning the Party membership of the 29 individuals; it evinced no interest in any activities of petitioner jointly with Joseph Stern or the other 29 individuals or otherwise. Once he refused to expose, the Committee dismissed him (R. 91).

On May 11, 1954, the House of Representatives voted a contempt citation against petitioner, and on November 22, 1954, he was indicted under 2 U.S.C. § 192 on seven counts for refusal to answer the Committee's questions as to

[3] Earlier petitioner had identified Gil Green, Fred Fine, and Bill Sentner in line with this same policy (R. 80).

whether the 30[4] named persons had been members of the Communist Party.

Petitioner moved to dismiss the indictment, or for preliminary hearing, on the ground that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him (R. 4-10). The motion was denied (R. 11).

Prior to trial, on May 16, 1955, petitioner served upon the Clerk of the Committee (and in case he should not have possession, also upon the Clerk of the House of Representatives), identical subpoenas calling for all the information in the possession of the Committee relating to petitioner and the persons named in the questions set out in the indictment (R. 11-14). The Government moved to quash these subpoenas primarily upon the ground that the material sought was irrelevant (R. 15), also asserting that it would take "three research analysts approximately two weeks to assemble the documents sought and would take a truck to bring it to the courthouse" (R. 19, 46).[5] The Dis-

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[4] The indictment contains 31 names (R. 2-3). One of these, however, is a duplicate (Marie Wilson) and another is Joseph Stern about whom petitioner answered.

[5] Petitioner filed counter-motions, requesting the court to rule the documents relevant and material to petitioner's defense and further to request the House of Representatives to permit the inspection and copying of the documents (R. 16). Petitioner's motion took this form because the House of Representatives has traditionally asserted a privilege to refuse access to documents even to the courts. 6 Hinds, *Precedents*, § 587. However, the House will under certain circumstances, after affirmative vote of the House, make documents in its possession available for inspection and copying by a court and the parties. It has been the recent general practice of the House to grant such permission in cases in which the court finds that the documents subpoenaed are relevant and material. See instances cited in the Manual of the House of Representatives (1955) § 291. Petitioner's counter-motions were denied along with the quashing of the subpoenas (R. 19).

trict Court quashed the subpoenas on the ground that the "documents which the subpoena seeks are not relevant to the issues in this case" (R. 19).

Trial by jury was waived and the trial commenced on May 25, 1955 (R. 18). The Government called only Mr. Kunzig, who had been counsel for the Committee at the time petitioner testified. Mr. Kunzig read for the record the transcript of petitioner's appearance before the Committee and testified as to certain aspects of Committee procedure. On cross-examination, counsel for petitioner read to Mr. Kunzig the Government's statement in its motion to quash the subpoenas that "it would take three research analysts approximately two weeks to assemble the documents sought [i.e., relating to petitioner and those about whom he was questioned and refused to answer] and would take a truck to bring it to the courthouse." Despite the fact that the District Judge, who had already ruled that this material was not relevant to the issues in the case, sustained objections to many questions put to Mr. Kunzig on this point, a reading of Mr. Kunzig's full testimony on this matter (R. 49-52) leaves little doubt that this truckload of material was never examined prior to the issuance of the subpoena to petitioner or prior to his testimony at the hearing.

At the close of the Government's case, the defense renewed its motion to dismiss on the ground that the grand jury was improperly constituted (R. 53). It also moved to dismiss, or for a judgment of acquittal, on the grounds, among others, that the Committee, in asking the questions petitioner would not answer, was engaged in the exposure of individuals unrelated to any legislative purpose and was thus exceeding its constitutional powers as a congressional investigating committee, that the First Amendment protected petitioner against forced answers to the particular

questions asked him, and that 2 U.S.C. § 192, read together with the Committee's authorizing resolution, was so vague and indefinite as to deprive petitioner of due process of law (R. 53-56). The District Court denied all of petitioner's motions (R. 17, 56).

The defense opened its case by renewing its motion to the court to request the House of Representatives to permit the inspection and copying of the material described in the subpoenas, which was denied (R. 58). Thereupon, the defense made an offer to prove "through the subpoenaed material that the committee had in its files all the information which it sought to elicit from the defendant about him and each of the other 30 individuals referred to and, in fact, a great deal more such information" from which "it would follow that the committee had no legislative purpose in its questions to defendant but rather had the sole purpose of . . . exposing him to the contempt of his labor associates by forcing him to inform on past associates and exposing to public contempt through the mouth of the defendant the persons about whom he was questioned" (R. 58-59). The defense further offered to prove, in large part by official public statements of the Committee, that the Committee has asserted a function and power to expose individuals to the public independent of any function related to legislation (R. 60). The District Court sustained the Government's objection to this evidence and it was included in the record as an offer of proof (R. 62-64).

The District Court thereupon found petitioner guilty (R. 64), and subsequently imposed a sentence of a $500 fine and a suspended sentence of imprisonment for one year (R. 18). At the time of sentencing the Court stated:

> "While I have found him guilty of contempt of Congress, he did not evidence any disrespect before the committee or engage in any disorderly conduct or at-

tempt to impede the committee in any respect, other than his refusal to answer questions dealing with persons, who, to use his words,

'may in the past have been Communist Party members or otherwise engaged in Communist activities, but who to my best knowledge and belief have long since removed themselves from the Communist movement.'

In other words, he claimed that he should not be required to 'inform' on people he had known.

"He answered all questions about himself and his own activities. He did not claim the Fifth Amendment. He claimed it would be wrongful to testify with respect to former associates. He stated that he would answer if a court of law directed him to do so. In taking this position, he acted on the advice of counsel. While his reasons for refusing to answer do not constitute a defense, I think they should be taken into consideration in determining the penalty which should be imposed for the violation of the statute."

From the judgment of conviction and sentence, petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. A panel of that Court, on January 26, 1956, reversed the conviction by a two-to-one majority and remanded the case with directions to enter a judgment of acquittal.[6] After the Government's petition for rehearing *en banc*[7] was granted and the case reargued

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[6] The opinion of the majority of the panel (Chief Judge Edgerton and Circuit Judge Bazelon) is "nearly identical" with the dissenting opinion of the same two judges after the case was reargued *en banc* (R. 185).

[7] The determination of the Chairman of the Committee to protect his asserted untrammeled power of exposure is evidenced by his own statement, while testifying on February 23, 1956, before another committee of Congress on an appropriation bill, that he had insisted on the Gov-

before the full court, the court, largely accepting the opinion of the dissenting judge from the earlier panel, upheld petitioner's conviction by a majority of 6 to 2 (R. 175). Petitioner filed a petition for rehearing pointing out that the majority opinion seems to hold, erroneously, (i) that there *could* always be a valid legislative purpose in a congressional committee asking witnesses whether certain persons had once been members of the Communist Party and (ii) that, therefore, since there *could* have been a valid legislative purpose, proof that there was in fact no valid legislative purpose in particular questions, but only a purpose to expose, does not invalidate congressional committee action. Petitioner also pointed out in his petition for rehearing that the court had failed to make any reference in its opinion to the substantial question presented whether he had been deprived of his constitutional right to a fair and impartial grand jury. The petition for rehearing was denied by the full court (R. 200), and this Court granted certiorari.

Summary of Argument

I

The "power to investigate, broad as it may be, is . . . subject to recognized limitations" (*Quinn* v. *United States*, 349 U.S. 155, 160-161) and one such clear limitation is provided by the doctrine of separation of powers. When the sole or primary purpose of a congressional committee is

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ernment petitioning for rehearing after petitioner's conviction had been reversed by the panel. Mr. Walter stated: "The trouble is certain circuit courts of appeals lean over backwards to reverse convictions. It is such an outrageous thing that the Department of Justice on the insistence of your humble servant insisted on presenting a matter to a full court to review a decision. I invite you to look at the background of the two judges that set aside this conviction." *Hearings Before Subcommittees of the Committee on Appropriations*, House of Representatives, 84th Cong., 2d Sess., Second Supplemental Appropriation Bill, 1956, p. 47.

the exposure of individuals to public scorn and retribution, the committee is engaging in a legislative trial in violation of the doctrine of the separation of powers. Although a congressional committee may compel testimony which involves the exposure of individuals when such exposure is ancillary and incidental to an investigation in aid of legislation, it has no separate and distinct power of exposure unrelated to a legislative purpose.

The events of recent years have shown what happens when a congressional committee crosses the line from investigation in aid of legislation to investigation for the purpose of exposure and retributive justice. The investigation turns into a legislative trial with the functions of prosecutor, judge and jury all combined and the accused denied the right to impartial and independent judgment. Thus the experience of recent years, in which congressional investigations have invaded the province of the Executive and the Judiciary, combine with the history and logic underlying the doctrine of the separation of powers to demonstrate the necessity for limiting the authority of congressional committees to inquiry in aid of legislation. *Exposure for exposure's sake is beyond the pale.*

II

The questions petitioner refused to answer were asked solely for the purpose of exposing him and his former associates to public scorn and ridicule. Petitioner's proof of this exposure purpose took three forms:

> First, that the Committee asserted the power, as a separate and independent function apart from any investigation in aid of legislation, to expose allegedly subversive individuals to public scorn and retribution.
>
> Second, that the Committee itself, by its questioning

of petitioner and its colloquies with him, evidenced an unmistakable purpose of exposure.

Third, that the Committee had available to it in its own files, which it failed even to examine before subpoenaing petitioner, the information which it sought to elicit from petitioner.

Where the courts below erred was in their refusal to admit into evidence and to consider petitioner's overwhelming proof in each of these categories.

A. The Committee from its earliest days in 1938 down to the present has asserted a separate and independent function, all apart from investigation in aid of legislation, to expose allegedly subversive individuals to public scorn and retribution. In the words of the present Chairman of the Committee, "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society" (see p. 44; *infra*). Acting on this asserted function, the Committee has sought to identify present and past Communists, list them publicly, disseminate the listings as widely as possible, pronounce clearance or judgment of guilty and procure the application of social or economic sanctions to the guilty.

We do not assert that the Committee has at no time engaged in investigations in aid of legislation. We simply take the Committee at its word: that it has interpreted its assignment to include both exposure of individuals unrelated to any legislative purpose and the task of recommending or commenting on legislation. Thus the Committee's own interpretation of its functions is the background against which the questioning of petitioner must be judged, for, as the minority below stated, "it may be in-

ferred from a person's statement that he intended to do something, that he later actually did it" (R. 196).

B. The Committee, by its questioning of petitioner and its colloquies with him, evidenced an unmistakable purpose of exposure for exposure's sake. Petitioner informed the Committee that he would answer all questions about himself and about those whom he had known to be members of the Communist Party and who he believed still were; he only refused to testify about the Party memberships of those who had long since removed themselves from the Communist movement. The Committee was not interested in petitioner's activities or in the activities of others; all the Committee wanted was for petitioner to identify publicly as ex-Communists 30 persons whom he had known when he was cooperating with the Communists some 10 years before. The Committee did not seek the benefit of petitioner's experiences or informed opinions as they related to Communist techniques in labor unions. Although petitioner himself referred to the non-Communist oath provisions of the Taft-Hartley Act of 1947, the Committee did not ask a single question about the effect of this law or any later anti-Communist laws upon Communist activities in the labor movement or any questions relating to the strengthening of such laws—questions which would have been of vital significance to the Committee if it had been considering supplementary legislation. The Committee demanded only that petitioner become a vehicle of its exposure function and, acting as an informer, point the finger at a group of persons he had known some 10 years before. When he asserted that the Committee was going beyond the scope of its authority (R. 85), they gave him no indication of any legislative purpose. Instead, they dismissed him from the stand.

C. The Committee had in its possession a truckload of information concerning petitioner and the 30 individuals

named in the indictment (R. 46-47) and did not even bother to review this information before subpoenaing petitioner to testify at a public hearing in Washington (R. 49-52). The fact that the Committee did not know or care what it had in its own files is added evidence that the Committee's sole concern was to use petitioner as a vehicle of its pronounced policy of public exposure.

D. The majority below erred in refusing to consider the evidence of exposure presented by petitioner. The majority apparently justified this refusal by its conclusion that there *could* have been a valid legislative purpose in the questions petitioner refused to answer and therefore proof that there was in *fact* no such legislative purpose but only a purpose to expose does not invalidate congressional committee action. This refusal to consider proof of a purpose of exposure unrelated to any legislative purpose renders academic and meaningless the authoritative decisions of this Court limiting the investigative power, for *ex post facto* legislative rationalization of particular questions is always possible. If the position of the court below is allowed to stand, there will be no defense against a legislative trial.

III

A. The issue of statutory construction—whether the Committee's authorizing resolution covered the questions petitioner refused to answer—raises extremely complex problems of congressional intent. These problems arise from the possible ratification by the House of the broad interpretation of the Committee's authorization upon which the Committee has acted over the years with the knowledge of the members of the House. Because of this factor of possible ratification, counsel for petitioner would have preferred, as a sheer matter of advocacy, to have relied on the clear and overwhelming arguments against

exposure. Mindful, however, of our responsibility to this Court to give recognition to the doctrines favoring the avoidance of constitutional issues, we have deemed it incumbent upon us to present the authorities and reasons in support of the argument that the Committee has exceeded its own governing authorization in the instant case and that no legal ratification of the Committee's broad interpretation of its charter has ever been accomplished.

B. The questions petitioner refused to answer do not fall within the language of the Committee's authorization. The language authorizes the Committee to investigate (i) the extent, character and objects of un-American propaganda activities, (ii) the diffusion of subversive and un-American propaganda and (iii) other questions in relation to (i) and (ii) "that would aid Congress in any necessary remedial legislation." Reading the quoted phrase as modifying the authority set forth in (i) and (ii) as well as in (iii), the questions petitioner refused to answer, which were for exposure and would not "aid Congress in any necessary remedial legislation" (Point II), were clearly outside the Committee's authority. For, whatever its utmost scope and outer limits, the language used by Congress makes clear that the authority of the Committee cannot be considered to include a mandate to engage in exposure.

In a narrower sense the questions upon which petitioner's conviction are based appear to be unauthorized by the language of the resolution, which is confined to propaganda and propaganda activities. When the questions petitioner refused to answer are examined in the light of an inquiry limited to propaganda and propaganda activities, their lack of pertinence becomes evident. These questions were unrelated, both in substance and in time, to any possible issue involving propaganda. We submit that, were it not for the possibility that the House has ratified the broad

construction of the Committee authority which the latter has asserted and acted upon over the years, there would be no doubt that the questions petitioner refused to answer were outside the scope of the Committee's authorization.

C. Petitioner does not minimize the difficulties and complexities surrounding the issue of ratification. There can be little question that the House extended the life of the Committee and appropriated funds for it many times with full knowledge, through Committee reports, hearings and debates, that the Committee asserted an independent power of exposure in areas covering subversive and un-American activities far removed from propaganda. But a careful examination of the debates on the floor of the House on the occasions of extension, reenactment and appropriation, leads to the conclusion that there was no consistent congressional intent with respect to the precise scope of the Committee's authority. While the preponderant voice in these debates seems to have favored the asserted broad powers of the Committee, there was a distinct and forcefully-expressed minority view even among those voting in favor of the Committee. Thus, some members of the House indicated that they disagreed with the broad view of the Committee's authority and voted in favor of the Committee in the understanding that it would restrict its activities to proper ones in the future. And further doubt is cast on the meaning which can be ascribed to affirmative votes for the Committee by the frank remarks of Congressmen themselves to the effect that members of the House did not want to be accused of refusing to vote for investigations in this area.

This Court has recently indicated its scepticism of the doctrines of acquiescence and ratification. *Cf. Peters* v. *Hobby*, 349 U.S. 331. There are good reasons for viewing with such skepticism here, for the Committee's construc-

tion of its authorizing resolution goes so far beyond the plain meaning of the language that one may question whether the doctrine of ratification has any application at all. In view of these doubts concerning the applicability of the doctrine of ratification and the questions raised as to the congressional intent to be derived from the debates on the floor of the House, this Court may deem it appropriate to avoid the constitutional issues already presented by rejecting the contention as to ratification, and holding the questions petitioner refused to answer outside the scope of the authorizing resolution.

IV

The compelled disclosures sought by the Committee abridge rights protected by the First Amendment. We assume for purposes of this point, that this Court has rejected petitioner's argument that the Committee's purpose was exposure rather than investigation in aid of a valid legislative purpose. But it does not follow that the Committee could constitutionally require petitioner to reveal past political affiliations of his one-time associates. While the absence of a legislative purpose clearly invalidates Committee action, its presence cannot validate governmental abridgment of constitutional liberties.

A. Even before this Court's decision in *United States* v. *Rumely*, 345 U.S. 41, it was manifest that congressionally-compelled testimonial disclosures are subject to First Amendment prohibitions, for congressional inquiry, like congressional legislative action, may abridge the individual's freedom to espouse and express political views and to associate with others for political purposes. But any remaining doubt as to the applicability of the First Amendment to congressional inquiries was resolved by this Court in the *Rumely* case.

Although *Rumely* makes clear that congressionally-compelled testimonial disclosures may violate First Amendment rights, this Court has not yet elaborated guiding criteria for "the accommodation of these contending policies"—the policy underlying the First Amendment and the congressional power to require information as the basis of legislation. Whatever formula may ultimately be devised for accommodating the power of congressional inquiry with First Amendment guarantees, there will always have to be a weighing of the respective interests in the particular case. Thus, while future close cases may require this Court to establish more particular criteria, no such precise criteria are necessary here, for petitioner's First Amendment claims must be honored under any fair balance of the respective policies involved in the instant case. It is just this balancing of conflicting policies that the court below refused to undertake once it determined that the questioning of petitioner could be related to some legislative purpose.

B. Petitioner and the persons whom he was required to identify as former Communist Party members enjoy a constitutional right to engage in political activities and undertake political affiliations, free from unwarranted public revelation. The secrecy of the individual ballot and the privacy of political beliefs are not merely personal privileges—they are indispensable political necessities. Requiring petitioner to disclose the past political affiliations of his former associates abridges his right of political privacy as well as theirs. The right of political association, if it is to be meaningful, must include the right not to be subjected to public humiliation for such association.

Most serious is the prior restraint implicit in such compelled disclosures. First Amendment infringements cannot be evaluated without considering the effect of the Committee's questioning as a tangible and far-reach-

ing prior restraint upon the freedom of political activity and association of petitioner, of the persons whom he was required to identify and of the American public. If a union official from Rock Island can be subpoenaed in 1954 to disclose the 1944 political memberships of his former associates, fear will take the place of freedom of political association—as indeed it has to an unhealthy degree. Moreover, the restraint on the exercise of First Amendment rights implicit in the Committee's use of the power of compelled identification is compounded by the circumstances, the manner and the consequences of identification before the Committee. It is these realities of the legislative trial that today cause many to hesitate before undertaking political activities and associations.

C. There is no pervasive congressional need for the information sought from petitioner which could justify the restraints on political liberties here involved. At the time of petitioner's appearance in 1954, the program and the activities, and the character and membership, of the Communist Party during the years of petitioner's participation had been exhaustively examined by the Committee. The accumulation of more names from this earlier period cannot easily be fitted into any pattern of congressional need nor did the Committee suggest any such need when petitioner questioned their authority. But, even if it were conceded, arguendo, that the Committee in 1954 actually required identification of those who were Communist Party members between 1942 and 1947, still there was no legislative need for the identifications demanded from petitioner. The conclusive answer to the contention that the Committee had a need for the identification of these individuals is that they had all already been identified before this very Committee, in some cases by more than one witness. No cogent reason can be suggested why the Committee required public re-

identification of persons already identified before it as former members of the Communist Party. As the present Chairman of the Committee stated at an earlier hearing, "How can it be material to the purpose of this inquiry to have the names of people when we already know them?"

D. The court below was obligated to undertake an accommodation of the conflicting policies underlying the congressional power of inquiry and our First Amendment freedoms. It is precisely this weighing of conflicting policies that the court failed to undertake. Instead, the majority placed its principal reliance upon an earlier statement that "personnel is part of the subject." But, whatever justification the theory that "personnel is part of the subject" might have provided for the identification of Communists in strategic positions when Congress first initiated investigations into Communist activities, it cannot now support continued identification and re-identification of those who were Party members long ago. Even under the most liberal view of congressional authority to obtain legislative information, the action of the Committee cannot stand.

V

Section 192, read together with the authorization of the Committee, is so vague and indefinite as to deprive petitioner of due process of law. The authorization of the Committee, read literally, is restricted to investigations of propaganda as such and to activities closely related thereto. But the broad and vague interpretation of the Committee includes the power to investigate and expose all subversive and un-American activities. A witness before the Committee must decide, under pain of criminal sanction, whether a particular question and answer would be within the terms "subversive" or "un-American" activities. Probably no

two words in common usage today have as varying meanings to different people.

The question whether Communist Party membership 10 years ago in a different political climate was "subversive" or "un-American" is certainly one on which reasonable men can and do disagree. Section 192, read together with the vague Committee authorization and the facts of this case, falls because "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

VI

We turn now to the grand jury question raised, but left undecided, in *Quinn* v. *United States*, 349 U.S. 155, 170; *Emspak* v. *United States*, 349 U.S. 190, 202; and *Bart* v. *United States*, 349 U.S. 219, 223. As in those cases, the Court here will no doubt desire to consider first whether petitioner's refusal to "inform" on former associates, in the circumstances of this case, constituted a violation of the contempt statute and will only reach this grand jury point if it should reject all of petitioner's previous arguments (Points I-V).

Petitioner moved for a dismissal of the indictment on the ground that, by virtue of the fear instilled by the government employees security programs, less than 12 grand jurors were free from bias against him and able to cast their votes impartially, or for a preliminary hearing. Petitioner, by affidavit of counsel attached to his motion for dismissal, made an affirmative showing that the personal bias and fear that this Court had found absent in *Dennis* v. *United States*, 339 U.S. 162, actually existed on the part of the grand jurors in this case. Although the Government filed no answering affidavit challenging these facts, both courts below held against petitioner without opinion.

The refusal of the courts below to dismiss the indictment, or grant a preliminary hearing, on the ground of grand jury bias and prejudice created by the government employees security programs deprived petitioner of his right to a fair and impartial grand jury (*Cassell* v. *Texas*, 339 U.S. 282), acting as a "responsible tribunal." *Beavers* v. *Henkel*, 194 U.S. 73, 84. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U.S. 162, 171-172; *Morford* v. *United States*, 339 U.S. 258, 259. Whether a defendant's right to a fair and impartial grand jury be based on the Constitution or upon the statute requiring grand jury action for the misdemeanor involved in contempt (see 2 U.S.C. § 194) or because the Government chose that method of proceeding, the right to a fair and impartial grand jury is undeniable. Certainly, a jury containing less than 12 grand jurors free from bias and prejudice against the defendant makes a mockery of the grand jury process.

ARGUMENT

I

The Congressional Power to Investigate Is a Limited Power and Does Not Encompass Exposure for Exposure's Sake

Petitioner contends that it is beyond the constitutional power of the Committee to compel testimony for the purpose of exposing individuals to public scorn and retribution.

We do not take the restrictive view that testimony may not be taken by a congressional committee which may involve the exposure of individuals and subject them to public scorn and retribution when such testimony is relevant to an investigation in aid of legislation. What we do

contend is that a congressional committee may not expose individuals where such exposure is the purpose, the sole or primary purpose, of the questioning and no legislative purpose exists. Such legislative trials of individuals have an odious history and under our constitutional system have no place in a congressional inquiry.

Nor do we take the restrictive view that congressional committees may only investigate in connection with a specific piece of legislation, proposed or enacted. By "investigation in aid of legislation," we mean and shall mean throughout this brief, all those investigations reasonably related to Congress' power to legislate, including the review of the actions of executive departments in the expenditure of public funds as well as the preparation of new legislation and amendments to the Constitution, and the continued survey of the operation of legislation already enacted. For this complex of activities we use the term "investigation in aid of legislation" or "legislative purpose."

A. *The Congressional Power of Investigation Is an Implied Power and Limited to Investigation in Aid of Legislation*

From the very beginning of the judicial consideration of congressional investigatory power, the nature of that power as an implied and limited function of Congress ancillary to its grant of legislative power has been recognized. Nowhere in the Constitution is there any reference to the investigatory power; it has had to be spelled out as auxiliary to the express legislative authority granted Congress by the Constitution. *Kilbourn* v. *Thompson*, 103 U.S. 168, 183; *McGrain* v. *Daugherty*, 273 U.S. 135, 173; see Fay, *Judicial Protection Against Abusive Practices*, 29 Notre Dame Lawyer 225, 226; Keating, *Protection of Witnesses in Congressional Investigations*, 29

Notre Dame Lawyer 212, 213. The exercise of this implied and limited power is subject to review by the courts; as early as 1875 Judge MacArthur asserted that "it is entirely competent for any court of justice to inquire into the privilege of Congress . . . the doctrine that Congress is . . . the sole and exclusive judge of its own privileges can never be the rule in a court of justice and can never be sustained."[8]

This Court delved into the background and historical precedents of the investigatory power and declared in its first case in this field that neither house of Congress "possesses the general power of making inquiry into the private affairs of the citizen," stressing the doctrine of separation of powers. *Kilbourn* v. *Thompson*, 103 U.S. 168, 190, 192-193. The investigatory power was again described as being subject to "controlling limitations or restrictions" in *McGrain* v. *Daugherty*, 273 U.S. 135, 176. In the latter case, this Court stated that "neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule . . . just stated is rightly applied" (pp. 173-174).

The Court again stressed the "limited power of inquiry" in *Sinclair* v. *United States*, 279 U.S. 263, 291-292, in a general review of the cases to date:

> ". . . while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and . . . a witness rightfully may refuse to answer where the bounds of the power are ex-

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[8] *Ex parte Irwin*, reported in full at 3 Cong. Rec. 707-27. To the same effect is *McGrain* v. *Daugherty*, 273 U.S. 135, 176, where this Court stated that ". . . a witness rightfully may refuse to answer where the bounds of the power are exceeded. . . ."

ceeded or where the questions asked are not pertinent to the matter under inquiry.

"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

The restricted nature of the power of Congress to conduct investigations was once again emphasized in the most recent pronouncement of this Court in *Quinn* v. *United States*, 349 U.S. 155, 160-161:

"There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes [citing *Cf. Anderson* v. *Dunn*, 6 Wheat. 204] or through judicial trial [citing *In re Chapman*, 166 U.S. 661]—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively [citing See *McGrain* v. *Daugherty*, 273 U.S. 135, 175].

"But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose [citing *Id.*, at 173-174; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190]. Nor does it extend to an area in which Congress is forbidden to

> legislate [citing Compare *United States* v. *Rumely*, 345 U.S. 41, 46]. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary [citing *Kilbourn* v. *Thompson*, 103 U.S. 168, 192-193]. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

In the *Quinn* case, the Chief Justice has again brought to the forefront what some proponents of unlimited investigatory power might perhaps have forgotten, its restricted and legislative nature. A similar reminder of the limited nature of the investigatory power comes from ex-President Truman. Viewing the problem from his experience both as legislative investigator and Chief Executive, Mr. Truman stated: "The investigative power of Congress is not limitless. It extends only so far as to permit the Congress to acquire the information that it honestly needs to exercise its legislative functions. Exercised beyond these limits, it becomes a manifestation of unconstitutional power. It raises the threat of legislative dictatorship . . . ."[9]

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[9] New York Times, May 9, 1954, p. 54. A noted student of the history of legislative investigations, and one who urged the broad view of Congressional power, has summarized the extent of the investigatory power in the succinct phrase "the limits of inquiry are the limits of legislative power." Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 213.

B. *Congressional Investigation Which Has As Its Purpose the Exposure of Individuals To Public Scorn and Retribution Is Beyond Constitutional Limits*

In the last section of the brief, we summarized the precedents which have delimited the implied power of investigation. At the very least, these cases support the following propositions relevant here:

(i) The investigatory power is a limited power subject to review by the courts.

(ii) The investigatory power is limited by the basic principle of our form of government—the separation of legislative, executive and judicial powers—which forbids congressional committees to make "inquiry into the private affairs of the citizen" unrelated to a valid legislative purpose or to encroach on the powers of law enforcement which are assigned under our Constitution to the Executive and the Judiciary. This limitation we will discuss here.

(iii) The third limitation is that inherent in the constitutional guarantees of individual liberty in the Bill of Rights, which restrict and modify all Congressional authority. The relationship of this restriction to the issues in this case is covered in Points IV and V of the brief.

We shall show in Point II that the Committee on Un-American Activities has acted in this case in pursuance of its expressed view that one of its separate and independent functions is the identification of allegedly subversive individuals and their exposure to public scorn and retribution. Here we shall demonstrate—if such demonstration be necessary—that a congressional committee has no such power of exposure unrelated to a legislative

The cornerstone of our government is the doctrine of separation of powers. "A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the Constitution." [10] "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." [11]

Legislative power concerns the determination by duly enacted law of general standards of conduct. The prosecution of individuals under duly enacted law is the concern of the law enforcement officers of the Executive branch of the Government. The determination of individual guilt and law violation is the concern of the Judicial branch. Courses of conduct or patterns of action may be legislatively inquired into only for the purpose of revealing the need for new laws and the effectiveness of existing laws, not for the purpose of exposure and punishment of the individual. When a committee of Congress determines that a general standard of conduct (past membership in the Communist Party) is reprehensible and seeks to enforce this standard by building a list of persons who engaged in that conduct

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[10] John Adams, letter to Richard Henry Lee, November 15, 1775; quoted by Benjamin F. Wright, "The Federalist on the Nature of Political Man," *Ethics*, January 1949, p. 9.

[11] *Myers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting).

and then, by publicity, inflicting upon such persons public scorn and retribution, the Committee is arrogating to itself, in this process of exposure, legislative,[12] executive and judicial functions in derogation of our historic separation of powers.

This is what we believe Mr. Chief Justice Warren meant when he wrote in the *Quinn* case that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." 349 U. S. at 161. This is also what we believe Mr. Justice Miller meant when he wrote in the *Kilbourn* case, in a discussion stressing the doctrine of separation of powers, that no congressional committee "possesses the general power of making inquiry into the private affairs of the citizen." 103 U. S. at 190. For, when a congressional committee inquires publicly into the private affairs of a citizen not in aid of a legislative purpose but for the avowed purpose of holding that citizen up to public scorn and retribution, that committee is prescribing a general standard of conduct, not theretofore part of the law of the land, applying that standard and determining guilt under it retroactively.

So, too, in *Greenfield* v. *Russel*, 292 Ill. 392, 127 N. E. 102 (1920), the Supreme Court of Illinois held that the legislature had no power to investigate "for the purpose of in-

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[12] If the Committee's determination of reprehensibility in the general standard of conduct (past membership in the Communist Party) can be deemed legislative in any sense, it is a legislative authority which belongs to the full Congress, not to one of its many committees. Furthermore, in so acting, the Committee is arrogating to itself legislative functions of a retroactive nature barred by the Constitution. Article I, § 9; Amendment V. See also *United States* v. *Lovett*, 328 U.S. 303. If Congress deems it necessary to penalize membership in the Communist Party by exposure, it can do so only prospectively and by duly enacted laws consistent with the Bill of Rights and enforceable not by the legislative branch but by the Executive and Judicial branches of Government.

tentionally injuring or vindicating any institution or individual," stating (p. 401):

> "If the rights of private individuals and private institutions could be invaded by the legislature in that manner, their reputation and their character and their business would be greatly endangered if not entirely destroyed, and they would not have or enjoy in such public investigations their constitutional right of answering and making a defense to such charges, however false they might be."

And in *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463, 2 N. E. 615 (1885), the New York Court of Appeals announced the same rule (p. 485):

> "An investigation . . . merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses . . . would not, in our judgment, be a legislative proceeding, or give to either house jurisdiction to compel the attendance of witnesses or punish them for refusing to attend."

See also Taylor, *Grand Inquest* (1955) pp. 30-135.

An example from another field might clarify the issue. Congress was acting within its constitutional authority in 1895 when it made the interstate transportation of lottery tickets a crime. *Champion* v. *Ames*, 188 U. S. 321. Despite this fact, no one would seriously contend that a congressional investigating committee could today use its compulsory process to build up a list and expose those who carried lottery tickets from state to state. Clearly this would be an encroachment upon the prosecutorial functions of the Executive and the adjudicatory functions of the

Judiciary. But how much more clearly would it have been an encroachment on the Executive and Judicial branches for a committee of Congress, in a wave of anti-gambling spirit in the early nineties, before the channels of interstate commerce were closed by law to lotteries, to have used its compulsory process to build up a list of those who had in years long past carried lottery tickets across state lines and to have exposed them for their past conduct to public scorn and retribution. This would indeed have been setting a general standard of conduct, applying that standard and determining guilt under it retroactively and without regard to any statutory period of limitations. As we shall see (Point II), that is exactly what the Committee asserts the power to do and what it has done in this case.

Nowhere is the wisdom of the doctrine of separation of powers more evident than in the field of congressional inquiries. The events of the past years have shown us what happens when a congressional committee crosses the line from investigation in aid of legislation to investigation for the purpose of exposure and retributive justice. The investigation turns into a legislative trial with the functions of prosecutor, judge and jury all combined [13] and the accused denied the right to impartial and independent judgment. The protections of the Bill of Rights fall by the wayside; partisanship, passion and prejudice are substituted for the safeguards of the courtroom. Jefferson's characteristic wisdom and foresight caused him to warn against

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[13] The Court will find significance, or at least amusement, in the Freudian slip of the tongue by committee counsel when he was testifying at petitioner's trial. When asked whether it was his responsibility to grant extensions of time on subpoenas, he answered: "Since at that point there were usually lawyers in the case, lawyers for *the defendants*—I pardon me—lawyers for the witnesses, I usually then would be called by one of the attorneys for a witness, and then usually, after conferring with the chairman, would grant the extension" (R. 42). (Emphasis supplied.)

legislative despotism in words applicable to recent congressional inquiries: "One hundred and seventy-three despots would surely be as oppressive as one." [14]

This point has been exceedingly well summarized by one student of the subject:

> "Congressional investigators are encroaching upon the constitutional functions of the executive and judicial branches of government. Congressional investigators are seeking to administer and enforce not only laws which exist but 'laws' which have never been enacted. They are in many instances conducting legislative trials and legislative inquisitions into the lives of private citizens without warrant of law and without regard to the constitutional safeguards enshrined in the Bill of Rights. Such proceedings are in circumvention if not violation of the constitutional provisions vesting the judicial power of the United States in the courts and forbidding the Congress to pass any bill of attainder or ex post facto law.
>
> "Witnesses are questioned regarding events that occurred fifteen, twenty years ago, not for the purpose of informing the Congress of present evils requiring legislative action, but for the purpose of holding individuals up to public scorn and obloquy, depriving them of their livelihood and punishing them for actions not forbidden by law. Witnesses themselves under inquiry are pressed to act as accusers and informers not regarding recent happenings which may involve present dangers but regarding happenings quite difficult to recall with reasonable accuracy because they occurred years ago in a totally different context of circumstances than that now prevailing. There are no statutes of limi-

[14] The Federalist, No. XLVIII (1778), p. 341.

tation to protect those who fall within the clutches of a Congressional investigation." Address of Mr. Benjamin V. Cohen to the Indiana B'nai B'rith Convention, Sept. 27, 1953.

Another careful observer, a former United States Attorney, has written as follows:

> "The congressional inquiry has not hesitated to plunge into fields overlapping the Executive and the Judiciary, to visit all the realities of conviction and punishment on individuals without the substantial safeguards of criminal procedure, to 'make' cases for prosecution even if it means inducing and entrapping the witness into the commission of crime, to call witnesses because they are accused of wrongdoing, and with little expectation that any information of value could be obtained from the witness. Legislative ventures unauthorized by express powers and intruding into fields reserved to other components of organized society make it imperative to bring remedial thinking abreast of realities." Fay, *Judicial Protection Against Abusive Practices*, 29 Notre Dame Lawyer 225, 234.

Both the history and logic underlying the doctrine of separation of powers combine with the experience of recent years in which congressional investigations have been invading the province of the Executive and the Judiciary to demonstrate the necessity for limiting congressional committees to inquiry in aid of legislation. If "the history of liberty has largely been the history of observance of procedural safeguards" (*McNabb* v. *United States*, 318 U.S. 332, 347), the history of legislative trials, from the days of Socrates to the present, teaches the dangers to a free society inherent in governmental action unguarded by those

procedural safeguards. *Exposure for exposure's sake is beyond the pale.*[15]

John Quincy Adams made this exact point in arguing against an unlimited congressional power of inquiry years ago in 1832 at another period of stress:[16]

> ". . . the authority of the committee and of the House itself did not extend; under color of examining into the books and proceedings of the bank, to scrutinize, for animadversion or censure, the religious or political opinions even of the president and directors of the bank, nor their . . . private lives or characters, nor their moral, or political, or pecuniary standing in society . . ."

A modern legislator, with outstanding experience in investigations, likewise views exposure investigations as beyond the power of Congress:

> ". . . the rights of Congress are no broader than the legitimate objects from which they have been im-

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[15] We have here predicated our argument against the congressional right to expose on the doctrine of separation of powers. The argument could have been equally well pitched upon the limitations on the investigative power arising from its nature as an adjunct to legislative authority. So too, a legislative inquiry designed not to further a legislative purpose but to try and expose an individual is a bill of attainder expressly prohibited by the Constitution. Article I, Section 9. Again, the forced public disclosure of unpopular associations without adequate legislative purpose abridges the right to speak, assemble and petition Congress guaranteed by the First Amendment. See *United States* v. *Rumely*, 345 U.S. 41, 43-45. Finally, the contempt statute, read together with the authorization of the Committee on Un-American Activities, would quite clearly be unconstitutionally vague and indefinite if not limited to questions in aid of a legislative purpose. See pp. 119-124, *infra*. All of these constitutional doctrines—separation of powers, limited legislative authority, bill of attainder, freedom of speech and assembly, vagueness and indefiniteness—lead inexorably to the same conclusion forbidding exposure for exposure's sake.

[16] Quoted in Taylor, *Grand Inquest* (1955), p. 139. For a full description of the controversy, see Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 179-180.

plied. And I believe those objects are *only* the two referred to a moment ago: (1) to gather facts about proposed legislation, and (2) to inquire into the workings of existing federal laws. There lies the first and perhaps the only important substantive restraint which Congress must impose upon itself. No congressional investigation is justified unless it can be directly related to the lawmaking process in one of these ways. In other fields, investigations are proper and often necessary, but not by Congress. It follows that I disagree strongly with those who argue that Congress is also responsible for informing and educating the public by looking into anything which may happen to catch the popular fancy of the moment." Keating, *Protection of Witnesses in Congressional Investigations*, 29 Notre Dame Lawyer 212, 214.

Dean Erwin N. Griswold of the Harvard Law School, in the course of his distinguished series of lectures on the Fifth Amendment and congressional investigatory power, has declared:[17]

> "In this connection I would like to state my own view that a legislative investigation is improper when its sole or basic purpose is to 'expose' people or to develop evidence for use in criminal prosecutions. We have had chairmen of legislative committees who have announced that that was the purpose of the hearings they were conducting. In my opinion, they have thus demonstrated the impropriety of the exercise of power which they are seeking to carry out, and I would hope that the courts, when properly invoked, would decide that there was no legislative power for such a purpose."

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[17] Griswold, *The 5th Amendment Today* (1955), p. 48.

And, in the same vein, Alan Barth, after a careful study of this entire problem, concluded that "it [the investigating power] cannot properly be used to 'expose' individuals and voluntary associations . . ." [18]

A concern with the use of congressional investigating committees as vehicles for exposure, similar to that expressed by these legislators and commentators, has led to the formulation of a proposed Code of Fair Procedure for Congressional Investigating Committees, which provides:

> "Sec. 3. *Subject Matter of Investigations.* a. A committee shall not conduct any investigation primarily to expose any person to public scorn or to collect evidence for use in any criminal prosecution." (Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 Col. L. Rev. 839 (1954)).

The very idea of congressional committee exposure for the sake of exposure unrelated to a legislative purpose is incompatible with our constitutional system. If the Congress deems a continuing system of exposing individual Communists is necessary or desirable to combat a present danger and existing legislation is inadequate to provide it,

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[18] Barth, *Government By Investigation* (1955), p. 199. Woodrow Wilson's oft-quoted statement—"the informing function of Congress should be preferred even to its legislative function"—is misquoted in this connection. "The view that investigating committees may undertake a generalized program of exposure for the sake of informing the public sometimes appeals for authority to Woodrow Wilson's observation about the informing function of Congress. . . . It should be noted, however, that Wilson was writing not about investigating committees but about discussion and interrogation within the main bodies of Congress. Moreover, he was writing specifically about legislative supervision of executive operations. There is certainly no warrant in what Wilson wrote for use of the investigating power to accomplish . . . exposure of the personal opinions of private citizens." *Id.*, p. 23. Furthermore, "President Wilson did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the First Amendment." *United States* v. *Rumely*, 345 U.S. 41, 44.

Congress has the authority to provide, prospectively not retroactively, for such disclosures and exposures by law as do not violate the Bill of Rights. *Cf.* Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781 *et seq.* But Congress has not the constitutional authority to delegate to itself or to a committee the power to define and determine individual wrongdoing by exposing persons to public scorn and retribution.

II

The Questions Petitioner Refused to Answer Were Asked Solely for the Purpose of Exposing Him and Former Associates to Public Scorn and Ridicule

Petitioner sought to prove in the trial court that the Committee's sole purpose in seeking to compel answers to the questions at which he balked was to expose him to scorn and ridicule by forcing him to become an informer on former associates and to expose them to scorn and ridicule by publicizing their previous Communist affiliations. Petitioner sought to demonstrate the Committee's purpose of exposure by three avenues of proof:

> First, that the Committee asserted the power, as a separate and independent function apart from any investigation in aid of legislation, to expose allegedly subversive individuals to public scorn and retribution.
>
> Second, that the Committee itself, by its questioning of petitioner and its colloquies with him, evidenced an unmistakable purpose of exposure apart from and unrelated to any legislative purpose.
>
> Third, that the Committee had available to it in its own files, which it failed even to examine before subpoenaing petitioner, the information which it sought to elicit from petitioner.

The District Judge, apparently believing that petitioner had no right to prove that the Committee's purpose was one of exposure, refused to admit petitioner's evidence in support of the First and Third propositions and to consider the questioning of petitioner (which, of course, had been introduced in evidence as part of the Government's case) as proof of exposure. The majority of the court below agreed with the trial court's refusal to admit petitioner's evidence in support of the First proposition and refused even to consider petitioner's evidence in support of the Second and Third propositions.

We submit that the intellectual hostility of the courts below to petitioner's proof of exposure evidences a lack of understanding of the doctrine of separation of powers and the dangers inherent in legislative trials. We have already shown that a witness testifying under subpoena before a congressional committee has the right to refuse to answer questions asked for the purpose of exposure and, as a corollary thereto, he must likewise have the right in court to make proof that this was in fact the purpose of the Committee in seeking to force answers to the questions at which he balked. In refusing to admit and consider petitioner's proof of exposure, the courts below have in effect deprived a witness before a congressional committee of his protection against a legislative trial.

Petitioner did not seek in the courts below, and does not seek here, to demonstrate some ulterior motive in the minds of the Committee. We do not bring to this Court the case of a committee chairman acting out of bias and prejudice against the witness or the case of one receiving money from a third party. What we do bring to this Court is a case where the objective facts demonstrate that the Committee was acting in pursuance of its asserted function of exposure and not its asserted coordinate function of investi-

gation in aid of legislation. If the absence of a legislative purpose cannot be proven in this manner, then the doctrine of separation of powers in this field is indeed a nullity and the citizen will be subject to the vagaries of a legislative trial.

We turn now to the three avenues of proof of exposure.

A. *The Committee on Un-American Activities Asserts the Power, as a Separate and Independent Function Apart from Investigation in Aid of Legislation, to Expose Allegedly Subversive Individuals to Public Scorn and Retribution*

At the trial below, petitioner offered in evidence a large amount of material as overwhelming proof that the Committee had asserted an independent power and function, apart from and unrelated to its duty to inquire in aid of legislation, to expose allegedly subversive persons to public knowledge and scorn. For this purpose petitioner offered in evidence a series of excerpts from official reports and hearings of the Committee (R. 62-63, 111-163), excerpts from statements on the floor of Congress by the Chairman and members of the Committee in connection with Committee business (R. 63, 164-168), and statements to the press by the Chairman and members of the Committee on Committee business (R. 64, 168-174). The Government conceded by stipulation that all the reports and statements had in fact been made and that the transcriptions were accurate (R. 62, 109-111). The Government, however, objected to the introduction of this evidence on the ground that it was irrelevant to any issue in the case and the District Judge, consistent with his apparent position that petitioner had no right to prove that the Committee's purpose was one of exposure and retribution, sustained the objection (R. 63-64). The defense proferred the evi-

dence as an offer of proof (R. 62-63) and it is in the record available for use in this Court. All apart from this offer of proof, however, it appears likely that most or all of the material would have been available to this Court on judicial notice. *Carolene Products Co.* v. *United States*, 323 U. S. 18, 28.

The majority of the court below stated that this "material is not evidence" and that "we must judge each inquiry in its own setting and upon its own facts" (R. 184). But certainly, consistent with petitioner's right to prove that the Committee's purpose in questioning him was one of exposure, petitioner had the right to prove that the Committee's regular course of conduct included exposure independent of any legislative purpose. The point was well stated by the minority below (R. 195-196):

> "The District Court ruled that express claims of an independent power of exposure, made without particular reference to the Watkins hearing, do not tend to prove that the Committee's purpose in the Watkins hearing was exposure. In our opinion this was error. Although general propositions do not decide concrete cases, they help to decide them. Intentions tend to result in acts. By claiming that it had the authority and duty to expose, the Committee implied that it intended to expose. And as the Fifth Circuit recently said, 'of course it may be inferred from a person's statement that he intended to do something, that he later actually did it. Mutual Life Ins. Co. of New York v. Hillmon, 145 U. S. 285, 295, 12 S. Ct. 909, 36 L. Ed. 706.' *Shurman* v. *United States*, 219 F. 2d 282, 290, fn. 9 (1955)."

What the Court is witnessing here is an effort by legislators to maintain one official position in Congress and before the people and another in the courts. While the Committee

makes political capital of its exposure activities the length and breadth of the land, its attorneys in court not only uniformly deny that the Committee had any such end in view, but seek to keep from the consideration of the courts the proof that the Committee asserted and acted upon this power of exposure. In a word, exposure is the Committee's byword everywhere except in the courtroom. We do not believe that the Committee can successfully turn one face to the Congress and the people and another face to this Court. In this belief, we turn now to the Committee's avowal of its exposure function and its implementation of this function.

1. *Exposure*

As the Committee itself proudly states, "exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938." This Committee, again in its own words, "was started on its way May 20, 1938, with instructions from the United States House of Representatives to expose people and organizations attempting to destroy this country. That is still its job and to that job it sticks" (R. 130, 131, *100 Things You Should Know About Communism* (1951), 82d Cong., 1st Sess., H. Doc. No. 136, pp. 19, 67). These statements by the House Committee, made in a pamphlet especially designed for public distribution and distributed in more than a million copies,[19] accurately reflect the view of its own power and functions which the Committee has taken. Identification, the listing of individuals, the passing of a judgment of guilt or innocence without regard to any statutory period of limitation and without regard to any preexisting law, the attempt to invoke public condemnation and social and economic osfracism of indi-

[19] Carr, *The House Committee on Un-American Activities* (1952), p. 357.

viduals, in short, exposure—all directed toward the public, rather than toward the House to which it is an appendage—have been a coordinate if not the primary or even the all-pervasive part of the Committee's work, totally independent of any of its legislative functions. The Committee, by its own avowals, has converted itself into a committee of public safety to identify and publicly brand individuals as enemies of the Republic.

The Chairman of the Committee on Un-American Activities in the 83rd Congress, the Committee which questioned petitioner, described the Committee's function as one to "ferret out Communists" and track "down individual Communists" (R. 169-170), stating:

> "So as a committee of Congress, elected by the people, we feel that we have a duty and that duty has been imposed upon us by Congress not only to report to Congress for the purposes of remedial legislation but to inform the people who elected us about subversive activities" (R. 150).

This asserted independent power to expose had long before been described as a "*special function*" of the Committee—"the discovery and exposure of those enemy groups which fight with non-physical weapons as a fifth column on our home front" (R. 151-152).

Possibly the clearest statement on this subject is that of the present Chairman of the Committee. Defending the Committee's August, 1955, investigation of Communism in the theatre, Chairman Walter stated: "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." *U. S. News and World Report*, August 26, 1955, p. 71.

While at some times and on some occasions the Committee may well have performed a legislative function, it is quite clear that in the proceedings in which petitioner was involved, the Committee was not performing or even attempting to perform a legislative function. It was acting, in the Chairman's words, "unlike most congressional committees." It was asserting, in addition to and completely apart from its legislative functions, a power and duty to find and publicly identify every past or present Communist, and then to embody that identification in some printed report to be circulated to the American people—that whole system of operation which has come to be called "exposure."

2. *Identification*

The identification of individuals is the first step in this well-organized system of exposure. Here is how the Committee, down through the years, and up to and including the Committee in the 83rd Congress, before which petitioner appeared, has openly proclaimed that public identification of individuals is what it is looking for:

> "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities." (R. 163, H. Rep. No. 2, 76th Cong., 1st Sess., p. 13 (1939)).
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> * * * * *
>
> ". . . Investigation to inform the American people . . . is the real purpose of the House Committee . . . The committee conceives its principal task to have been the revelation of the attempts now being made by extreme groups in this country to deceive the great mass of earnest and devoted American citizens . . .

The purpose of this committee is the task of protecting our constitutional democracy by . . . pitiless publicity. . . ." (R. 163, H. Rep. No. 1476, 76th Cong., 3d Sess., pp. 1, 3, 24 (1940)).

* * * * *

"This committee is the only agency of Government that has the power of exposure. . . . There are many phases of un-American activities that cannot be reached by legislation or administrative action." (R. 163, H. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941)).

* * * * *

"The Committee would like to remind the Congress that its work is part of an 11-year continuity of effort that began with the establishment of a Special Committee on un-American Activities in August 1938. The committee would also like to recall that at no time in those 11 years has it ever wavered from a relentless pursuit and exposure of the Communist fifth column." (R. 128, *Annual Report for 1949*, p. 15).

* * * * *

"In this annual report, the committee feels that the Congress and the American people will have a much clearer and fuller picture of the success and scope of communism in the United States by having set forth the names and, where possible, the positions occupied by individuals who have been identified as Communists, or former Communists, during the past year. In the matter of hearings relating to the motion-picture industry and professional groups, the committee is including those individuals who were named during 1951, inasmuch as these hearings have been of a con-

tinuing nature." (R. 120-121, *Annual Report for 1952*, p. 6).

* * * * * *

"The Senate group, Mr. Velde said, is searching for 'organized' communistic activity in the educational system and dealing with institutions. His committee will continue to concentrate upon 'individual members of the Communist Party who in the past and possibly at the present time, are engaged in the field of education'." (R. 169, New York TIMES, February 12, 1953).

* * * * * *

"In an opening statement, Mr. Velde insisted that the investigation was no different from preceding inquiries into labor unions and other areas. He emphasized that the committee was not seeking to investigate institutions as such, but to ferret out Communists operating within them." (R. 169-170, New York TIMES, February 26, 1953).

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"The House Un-American Activities Committee said today it had decided to make no changes in its methods of ferreting out Communists wherever it found them." (R. 170, New York TIMES, May 21, 1953).

* * * * * *

"These hearings could be properly considered as a continuation of the hearings which the Committee on Un-American Activities held in Detroit, Mich., in 1952. As a matter of fact, in 1952 the committee reported that during its investigation the identity of over 600

individuals as Communist Party members was obtained." (R. 113, *Annual Report for 1954*, pp. 14-15).

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"Mr. Moulder. . . .

"The Committee on Un-American Activities has and will continue to expose communism. It has an excellent record of public service in exposing and warning the American people of the evils of communism, and we must not permit baseless propaganda to injure the work of the committee." (R. 165, 99 Cong. Rec. 1985, March 16, 1953).

• • • • •

"Mr. Jackson. . . .

"The work of the House Committee on Un-American Activities is one designed to give the American people a continuing picture of the Communist Party at work; to expose its propaganda efforts, and to inform citizens of organizations and individuals dedicated to the destruction of the American Republic. Its investigations are confidential only to the extent necessary to determine facts. Its hearings are public, open to all informational media, and its millions of publications go directly to the people of this Nation." (R. 165, 99 Cong. Rec. 2019, March 17, 1953).

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"Mr. Velde. . . .

"No. 1. Demands and requests that an investigation be made of individual Communists in the religious field. To these loyal and sincere citizens, may I say that I feel Communists should and will be ferreted out and reported to the Congress and to the people; wher-

ever they may be found." (R. 165, 99 Cong. Rec. 2130, March 19, 1953).

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"Mr. Jackson. Mr. Speaker, during the past 3 years, the Committee on Un-American Activities, of which I am a member, has been conducting an investigation into the extent of Communist infiltration of the Hollywood motion-picture industry. During this period, the committee has exposed several hundred persons who were employed in the motion-picture industry and who were or are members of the Communist Party." (R. 166, 99 Cong. Rec. 1371, February 24, 1953).

Identification has been the preoccupation of the Committee not only in statements such as those quoted above but also in the actual conduct of its hearings. A comparison of the number of times in the course of its hearings that the Committee has asked the question, "Do you know John Doe to be or have been a member of the Communist Party?", to the number of times it has asked substantive questions, would demonstrate that the paramount interest and concern of the Committee lies in identification. It is conceivable that some years ago, at the beginning of congressional interest in subversive activities, the identification of Communists in strategic positions pursuing currently or recently a course or pattern of conduct prescribed by the Communist Party might well have had a direct relevance to appropriate legislative inquiry with respect to the activities of adherents of the Communist Party, and the need for new legislation or more effective enforcement of existing legislation. But it is inconceivable that some eighteen years of repetition of questions serving only to identify as Communists—not presently but in years

long past—thousands of ordinary individuals all over the country without even attempting to show the nature of their work for the Party in recent years, has any purpose other than the exposure of those individuals.[20]

As part of its identification process, the Committee invites individuals and patriotic organizations to send in the names of suspected Communists.[21] From these and other sources, the Committee maintains extensive files, which it has variously described from time to time as including: 1,000,000 names,[22] individual files on 3500 leaders of the Communist Party, its front organizations and leaders of Fascist groups,[23] and a collection of lists of signers of Communist Party election petitions, which contain 363,119 signatures.[24]

As far as can be determined, persons are included in the files prior to formal "identification" by a "friendly" witness before the Committee. Any information received about

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[20] ". . . the committee has sometimes seemed more interested in exposing allegedly subversive *persons* than it has in exposing subversive *activity*. Admittedly, the committee has many times sought and obtained evidence showing that actual misdeeds have been committed. Its hearings on atomic espionage and on espionage in the government service were certainly concerned with such misdeeds. But all too frequently the committee has been content to put the finger on Communists or fellow travelers while making little or no attempt to demonstrate that they have engaged in any acts of a subversive character." Carr, *op. cit. supra*, p. 454.

[21] R. 125, Annual Report for 1951, p. 5; Statement of Chairman Velde in New York Times, January 28, 1954, R. 171:

> "The House Un-American Activities Committee moved into the picture this afternoon. Its chairman, Harold H. Velde, Illinois Republican, suggested that the VFW supply names of suspected Communists to the Committee as well as to the FBI.
>
> "We welcome the cooperation of such patriotic organizations," he declared.

[22] H. Rep. No. 2748, 77 Cong., 2nd Sess., p. 2; Carr, *op. cit. supra*, p. 253.

[23] R. 129, Annual Report for 1949, p. 19.

[24] R. 127, Annual Report for 1950, p. 41.

"subversive" individuals is apparently sufficient to cause the inclusion of an individual in the files of the Committee. This is evident from the fact that the Committee has issued "reports" to members of Congress on tens of thousands of persons,[25] but it has only "obtained positive identification of 4151 persons who had been Communist Party members."[26] The nature of these files is evidenced by a typical report issued on Herman F. Reissig, a Protestant minister, which was published in the Congressional Record.[27] The "so-called" public files of the Committee appear to consist in part of names obtained, without sifting, from a mass of documentary material relating to alleged Communist and front organizations.[28]

The formal public identification takes place in the Committee hearing room, which in recent years and particularly in the 83rd Congress has tended to be in the city in which the individuals to be identified live, and not at the seat

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[25] R. 119, Annual Report for 1954, p. 133.

[26] R. 130, "This is YOUR House Committee on Un-American Activities," p. 18.

[27] R. 164-165; 100 Cong. Rec. 11589 *et seq.*

[28] Carr, *op. cit. supra*, pp. 253-254: "First, it has been argued that the committee has shown little discretion or responsibility as to the kind of information or material it has allowed to be placed in its files. and second, the committee has been attacked for the irresponsible manner in which it has allowed its files to be used. There is much justification for both criticisms.

"The files are a voluminous mass of miscellaneous, undigested materials and information pertaining to thousands of organizations and perhaps one million individuals. Physically, the file material is of two types: a card index consisting of hundreds of thousands of entries, and a very much smaller number of folders containing exhibits and source materials. A typical card carries the name of a person and makes a brief reference to some activity or organizational affiliation viewed as suspicious or questionable by the research or investigative divisions of the staff."

Senator Mundt, a former active member of the Committee, has remarked that the Committee has five rooms of files on un-American activities. Comment, *Legislative Inquiry into Political Activity*, 65 Yale L.J. 1159, 1162 n. 17.

of Government (R. 44, 116). The Committee's interest in "identifying" at the place of residence so as to bring maximum public attention to those being identified goes so far that it will sometimes call the same identifying witness a number of times in a number of different cities so as to achieve this result. See, for example, the appearance of Mrs. Hartle in both Portland and Seattle (R. 113-114, *Annual Report for 1954*, pp. 18-19); the appearance of Bella Dodd and Dorothy K. Funn in New York and Philadelphia (R. 116, *Annual Report for 1953*, pp. 57, 100).

3. *Listing*

Subsequent to the formal identification in a public session of the Committee comes the public listing of the identified individual. The annual report of a Standing Committee of the House is generally intended to inform the House of the facts necessary for the latter to exercise its legislative powers; in the case of this Committee, the recent reports have been largely a compilation of names of individuals with no effort to weigh the nature or character of their activities, past or present, or the relevance of the evidence concerning them to any legislative purpose. In the Report for 1953, 59 pages of a total 133 were devoted to listing the names and addresses of individuals who had been named before the Committee as present or former members of the Communist Party. The prior report for 1952 had utilized 54 out of 89 pages for the same purpose.[29]

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[29] The Annual Report for 1954, issued March 1955, omitted this personalized listing, possibly in response to the extensive criticism of the Committee on this point. But the emphasis on identification as the Committee's function had not changed. See R. 113, Annual Report for 1954, pp. 14, 17. This emphasis on identification was continued in the Annual Report for 1955. H. Rep. No. 1648, 84th Cong., 2nd Sess., pp. 1-3, 6, 7.

4. *Dissemination*

The Committee's view of its function and power as being one of exposure to public scorn and retribution appears concretely through its emphasis on dissemination of the lists and identifications which it has gathered. In a recent pamphlet which was intended to describe its operations and silence its critics, the Committee pointed out:

> "This committee and the special committee have over the past 16 years held hundreds of hearings and issued and distributed throughout the United States hundreds of thousands of reports exposing the operations of the Communist Party and its fronts" (R. 130, *This is YOUR House Committee on Un-American Activities*, p. 25).

Getting the information to the public is the aim and very heart of the process of exposure. Over the years the Committee perfected publicity techniques designed to reach the maximum number of people with maximum impact. Comment, *Legislative Inquiry into Political Activity*, 65 Yale L. J. 1159, 1161; Cushman, *Civil Liberties in the United States* (1956) pp. 195-196. In the course of the series of hearings at which petitioner testified, the Chairman stated:

> "Of course, we have had a great many hearings all throughout the country dealing with the subject of communism and the labor union movement. We have had a lot of our hearings printed, pamphlets, so that members in the Communist-dominated unions should know that we have the information and should be willing to read the information that is furnished free of charge in most instances by the Federal Government." [30]

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[30] R. 149, Hearings, Investigation of Communist Activities in Chicago Area (1954), Part 2, p. 4255.

These statements on the dissemination of information to the public must be read with the constant remembrance that the reports and hearings to which reference is made consist in major part of names, addresses and lists of individuals. It is that type of information which the Committee is desirous of putting into the hands of the public.[31]

5. *Clearance—or Judgment of Guilty*

While the judgment of the guilt or innocence of an individual has traditionally in our Government been the function of the Judiciary, and perhaps, for limited purposes, of quasi-judicial officers of the Executive branch, the determination of individual guilt or innocence of past or present Communist affiliation has been considered by the Committee to be an integral part of its exposure function. It demonstrates this in many ways: in its reiterated invitations to persons and organizations to "deny or explain" testimony given about them;[32] in its issuance to a research organization of an official "clearance";[33] and to a labor union of a finding of not guilty of being a Communist-front organization which reads like a judicial decree;[34] in its issuance of a finding that an individual was "not quali-

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[31] The Guide to Subversive Organizations, which the Committee publishes in up-to-date form from time to time, is another type of *list* which the Committee distributes wholesale.

[32] R. 116, Annual Report for 1953, pp. 60, 99; R. 124, Annual Report for 1951, p. 1; see also Annual Report for 1955, H. Rep. No. 1648, 84th Cong., 2nd Sess., p. 12.

[33] R. 117, Annual Report for 1953, p. 127; R. 172, New York Times, February 7, 1954.

[34] "Upon request of the officers of this union a subcommittee of this committee, on August 17, 1950, heard the testimony of Mr. Martin Wagner, President of the organization. From this evidence the committee finds:

"(1) the United Gas, Coke and Chemical Workers of America has taken energetic and effective measures to eliminate such influence.

"(2) All persons against whom substantial evidence of Communist ac-

fied for acceptability to any security position";[35] and in its determination to keep confidential an investigation because the suspected person has died.[36]

Clearance is the exception; guilt is the rule. Identification before the Committee automatically establishes the guilt and the guilty one's name is published in the lists of the Committee for all the world to see. This judgment stands unless and until counteracted by what the Committee, sitting as judge, considers as "genuine" evidence of mistake or repentance; then the Committee will amend its records.[37]

6. *Public Retribution*

The exposure operation would not be complete were not some results in the form of sanctions obtained from the identification and listing of individuals and the dissemina-

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tivities or views exists in the records of the Committee on Un-American Activities, have been removed as officers.

"(3) The charters of local unions found by the parent organization to be following the Communist Party line have been revoked.

"(4) According to a constitutional amendment adopted by the union, no person who is a member of a Communist, Nazi, or Fascist organization may be a member of the executive board or an employee of this union.

"Upon this testimony, the Committee on Un-American Activities has adopted a resolution providing:

"(1) The name of the UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA shall be dropped from future editions of the committee pamphlet '100 Things You Should Know About Communism.'

"(2) No additional copies of the present issue of any committee publication containing reference to this union shall be issued without notation that the statement about the union is no longer true.

"(3) Any statement by any person to the effect that this committee now finds that the UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA under its present officers and bylaws, to be under Communist influence or leadership, is unauthorized and untrue.

"(4) That a copy hereof, over the signature of the committee chairman shall be furnished the union." (R. 131-133, 100 Things You Should Know About Communism, p. 125.)

[35] R. 123, Dr. Condon, Annual Report for 1952, p. 74.

[36] R. 126, Agnes Smedley, Annual Report for 1950, p. 4.

[37] R. 129, Annual Report for 1949, p. 46.

tion of their names to the public. No attempt to conceal the hope that some form of social or economic sanction will result from its activities is made by the Committee. Perhaps the frankest statement concerning the object of the Committee's exposure system was made a few months after petitioner's appearance, by Representative Walter, then the ranking Democratic member of the Committee in the 83rd Congress and now its Chairman:

> "Rep. Francis E. Walter (D., Pa.) who will take charge in the new Congress of House activities against communists and their sympathizers, has a new plan for driving Reds out of important industries. He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.
>
> " 'By this means,' he said, 'active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.' " [38]

Industries or institutions which "clean house" to the liking of the Committee are praised;[39] those which do not do so are castigated.[40] Threats of deportation are made when aliens claim the privilege of the Fifth Amendment.[41] Gratification is expressed when those whom the Committee

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[38] R. 174, Washington Daily News, November 19, 1954. See also Carr *op. cit. supra*, p. 452. "It [the Committee] also had the much more simple goal of driving men from their jobs."

[39] R. 163, Hearings, Communist Methods of Infiltration (Education—Part 2), p. 221; R. 121, Annual Report for 1952, pp. 8, 12.

[40] R. 124, 125, Annual Report for 1951, pp. 2, 16.

[41] R. 173, New York Times, July 16, 1954.

has exposed are released from their employment,[42] or otherwise socially punished[43] as by expulsion from their union.[44] Unions are urged to expose the Communists and seek their prosecution.[45] The Committee has not exhorted in vain; these hoped-for results of social and economic sanctions have been forthcoming for thousands of individuals. Committee trials have in fact resulted in "punishment".[46]

* * * * *

"The committee's search for information that might lead to the enactment of laws—either the revision of existing laws dealing with espionage and sedition or the passing of entirely new statutes in this area—has been the slightest of all its interests through the years. Occasionally its interest in checking the work of administrative agencies, particularly that of the Department of Justice, has been substantial. But always its interest in public opinion has been paramount. Always the committee has been concerned lest the American people fail to share its understanding of the nature of subversive activity and the many forms it may take, or appreciate the seriousness of the threat offered by this activity to the 'American way of life' as seen by itself."[47]

As we have just shown, the Committee has asserted the power to expose individuals to public scorn and retribution.

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[42] R. 112, 113, Annual Report for 1954, pp. 7, 17; R. 115, Annual Report for 1953, p. 4.

[43] The fact of blacklisting in entire industries is a notorious consequence of exposure. Cogley, *Report on Blacklisting* (1956).

[44] R. 121, Annual Report for 1952, pp. 8, 12.

[45] R. 131, *100 Things You Should Know About Communism*, p. 76.

[46] Carr, *op. cit. supra*, p. 452-453. The commercial results of the emphasis on identification and listing by the Committee are described in Cushman, *op. cit. supra*, pp. 203-204.

[47] Carr, *op. cit. supra*, p. 272.

in committee hearings and reports, on the floor of Congress and in the public press. It has acted on this asserted power in thousands of cases. For this Court to fail to recognize that the Committee asserts an independent power of exposure, it "would have to be that 'blind' court against which Mr. Chief Justice Taft admonished in a famous passage, *Bailey* v. *Drexel Furniture Co.* (Child Labor Tax Case) 259 U. S. 20, 37, that does not see what all 'others can see and understand' . . ." *United States* v. *Rumely*, 345 U. S. 41, 44.

B. *The Committee, by its Questioning of Petitioner and Colloquies With Him, Evidenced an Unmistakable Purpose of Exposure Apart from and Unrelated to any Legislative Purpose*

Numerous attacks have been made on the Committee on Un-American Activities to the effect that its sole purpose is to expose individuals to scorn and retribution. We make no such broadside charge; indeed, we make no charge whatever. The official statements as well as the Committee actions which we have set out above demonstrate that the Committee has interpreted its assignment to include the exposure of individuals in addition to the committee business of recommending or commenting on legislation.[48] We accept the Committee's own interpretation of its functions and thus reach the basic question in the case: In which part of its two-pronged task was the Committee engaged when it asked petitioner the questions which form the basis of his indictment? Were its questions in aid of legislation or were they for the purpose of exposing petitioner through

[48] The Government suggests in its Brief in Opposition (p. 19) that petitioner is seeking to delve into some "ulterior motive claimed to exist within the minds of the legislators." But it would hardly seem to be proof of an ulterior motive to demonstrate that the Committee was acting in pursuance of its *asserted* separate and independent power of exposure. As the dissenting judges below put it: "No one's motives are impugned by showing the Committee's concept of its duty" (R. 196, n. 13).

his own mouth and of exposing the others about whom he was asked through petitioner's testimony? The Committee itself, by what it did and what it did not ask petitioner and by its colloquies with petitioner, provides the answer to this question: its purpose was, beyond doubt, one of exposure.

Petitioner appeared before the Committee on April 29, 1954. Immediately after perfunctory questions relating to his background were completed, counsel for the Committee launched into the meat of the hearing (R. 73). He read testimony from Donald O. Spencer, given in September 1952, concerning petitioner's involvement with the Communist Party and asked petitioner about the Spencer statement (R. 73). Petitioner denied the truth of Spencer's testimony (R. 73-75). Counsel then pressed petitioner on Spencer's testimony concerning petitioner, at which point petitioner made the following statement (R. 75):

> "I am not now nor have I ever been a card-carrying member of the Communist Party. Rumsey was wrong when he said I had recruited him into the party, that I had received his dues, that I paid dues to him and that I used the alias Sam Brown.
>
> "Spencer was wrong when he termed any meetings which I attended as closed Communist Party meetings.
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> "I would like to make it clear that for a period of time from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Communist activities to such a degree that some persons may honestly believe that I was a member of the party.
>
> "I have made contributions upon occasions to Communist causes. I have signed petitions for Communist causes. I attended caucuses at an FE convention at which Communist Party officials were present.
>
> "Since I freely cooperated with the Communist Party I have no motive for making the distinction

between cooperation and membership except the simple fact that it is the truth. I never carried a Communist Party card. I never accepted discipline and indeed on several occasions I opposed their position.

"In a special convention held in the summer of 1947 I led the fight for compliance with the Taft-Hartley Act by the FE-CIO International Union. This fight became so bitter that it ended any possibility of future cooperation."

Petitioner was then questioned briefly about the extent of his personal cooperation with the Party. The Committee did not then or later delve into the mechanics of cooperation within the union between this non-Party labor leader and the Party either during the period of his cooperation with the Party or after the "fight became so bitter that it ended any possibility of future cooperation" (R. 75). The Committee did not ask one further question about the details of the internal fight about compliance with the non-Communist oath provision of the Taft-Hartley Act to which petitioner referred in his testimony and which surely would have been of great significance to the Committee if it had been considering any legislation in the field of Communist infiltration of trade unions. Nor did the Committee ask petitioner a single question about the effect of this Taft-Hartley Act provision or of the later Internal Security Act of 1950 upon Communist activities in the labor movement or any questions relating to the strengthening of either of those laws—questions which would have been of vital significance to the Committee if it had been considering legislation to strengthen either law.

The questioning then moved into the Rumsey testimony concerning petitioner's alleged Party membership. Petitioner denied Rumsey's allegations, stating that possibly

Rumsey was biased against him because petitioner had caused his expulsion from a union (R. 77-78).

The Chairman then returned to petitioner's participation in Communist Party activities. He did not question petitioner about what was discussed at any meetings; he did not question petitioner about how the Communist Party worked with non-Party labor leaders; he did not ask about the effect of any existing or proposed legislation. He asked, "... with *whom* did you participate ..." in these activities (R. 80)? After this question was answered, Mr. Velde continued in his search for names: "All right. Will you proceed, then, with *others* that you have participated with in Communist Party activity" (R. 80)? Again petitioner answered the question.

After a short recess, counsel returned to the Rumsey testimony and petitioner repeated his earlier testimony (R. 82-84). Then, without interrogating petitioner about his union activities, or about the effect on them of his cooperation with the Communist Party before 1947 and his opposition to it after 1947, the Committee counsel immediately went into wholesale identification (R. 84-85):

> "Mr. Kunzig: Now, I have here a list of names of people, all of whom were identified as Communist Party members by Mr. Rumsey during his recent testimony in Chicago. I am asking you first whether you know these people."

Petitioner did not know the first few (R. 85); at the next name, that of Harold Fisher (first count of the indictment), Mr. Kunzig asked whether petitioner knew Fisher to be a member of the Communist Party.[49] Petitioner then made his

[49] With respect to all except two persons, Harold Fisher (Count One) and Ernest DeMaio (Count Four) the questions asked petitioner were about past membership. In the cases of Harold Fisher and Ernest DeMaio the questions were couched in the present tense. It seems clear, however,

statement, which he had carefully prepared in anticipation of this line of questioning, telling the Committee that he would answer all questions about himself, that he would answer questions about people he knew to be members of the Communist Party and who he believes still are, that he would not answer about people who once had been but no longer were Communist Party members, and that he did not believe the Committee had authority to ask about past political associations and to undertake the public exposure of persons (R. 85-86). The Chairman directed the witness to answer the question, stating that the Committee has authority "to ask you . . . concerning your knowledge of any other persons . . . who have been members of the Communist Party . . ." (R. 86). Then counsel went through his prepared list and asked the witness whether he had known each of the named persons to be members of the Communist Party, ending with a question containing a long list of 26 names (count seven of the indictment). Petitioner interrupted his refusals to answer, in accordance with the

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that what the Committee was after was petitioner's knowledge of the past membership of the 29 persons involved. In view of the earlier testimony by Rumsey and Spencer, who set the dates of petitioner's alleged party affiliation from 1943-46 (R. 136-137, 154), and petitioner's own uncontradicted statement that he had ceased any form of cooperation with the Communists in 1947 (R. 75), there can be no doubt that the Committee was questioning petitioner about past political associations. At any rate, if the Committee was seeking information about present membership, petitioner answered the questions. Petitioner stated that he would "answer questions about persons whom I knew to be members of the Communist Party and whom I believe still are" (R. 85), and would only refuse to answer about those who had "long since removed themselves from the Communist movement" (R. 85). Indeed, in implementing this principle, petitioner extracted the name Joseph Stern from a long list of names and answered affirmatively about Stern's present membership. Consequently, when petitioner replied to any question about present membership by standing on his statement, he was in effect denying that he knew the particular individual to be a present member and refusing to answer about past membership. *All petitioner ever refused to do was to answer about past membership of others.* This position was accepted both by the majority opinion below (R. 178) and the minority (R. 187, n. 2).

principle he had announced that he would identify persons he believed still to be members of the Party, and stated that Joseph Stern, one of the names in the long list of names, had "carried on Communist Party activities in the Quad City area" (R. 90). Counsel did not follow up on this; no attempt was made to obtain relevant information about Joseph Stern's activities in the labor movement.

When counsel had completed his list, and the witness once again had been directed to answer, the Chairman of the Committee said (R. 90-91):

> "It seems very clear to me that the witness has pertinent information concerning Communist Party activities which we are authorized and dutybound to investigate, and that the witness should in the spirit of cooperation with his Government answer those questions.
>
> "However, upon his refusal to answer those questions, there is nothing we can do at the present time to force the witness to answer those questions."[50]

The Committee had before it a witness who had been in the labor movement for 18 years. He admitted that he had cooperated with the Communists for five years; that he had been involved in a bitter internal struggle with them. He was an expert on the actual workings of Communism in the labor movement. He did not claim the Fifth Amendment; he did not refuse to testify; he was not a recalcitrant witness. He was respectful to the Committee and ready to do

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[50] In no way did the Committee or the Committee's counsel indicate, as is usual in a court of law when the immediate relevancy of certain questions is not apparent, that the questions would illuminate or have a bearing on the nature or motivation of a course of conduct or pattern of conduct to be established, which would be relevant to the consideration of any legislation or legislative problems. *In no way did the Committee or the Committee's counsel attempt to rebut petitioner's assertion that the Committee was undertaking "the public exposure of persons because of their past activities"* (R. 85).

his duty as a citizen. To the Committee, however, that duty was solely to elaborate publicly on his own involvement with the Communist Party and to identify publicly as members of the Communist Party 30 people who had already been identified by at least one, and in most instances, two people. The Committee did not want the benefit of petitioner's experiences as they related to Communist techniques in labor unions; it did not want the benefit of petitioner's informed opinion about Communist operations in the labor field or the effect of existing or pending legislation upon those operations. The Committee demanded only that petitioner point the finger publicly at himself and at a group of private persons whom he had known some ten years before. Nothing in the way of *ex post facto* legislative window-dressing or explanations that the questioning of petitioner *could* have had a legislative purpose can stand up against the stark facts of what the Committee wanted to know, and what the Committee was not at all concerned to know. The sole purpose of the questions underlying petitioner's indictment was the public exposure of 30 individuals.

C. *The Committee Had Available to it in its Own Files, Which it Failed Even to Examine Before Subpoenaing Petitioner, the Information Which it Sought to Elicit From Petitioner*

Petitioner sought to prove in the trial court that the Committee actually had the information about himself and the 30 individuals which it attempted to extract from petitioner in a public hearing and that therefore the Committee's purpose in forcing him to testify was to publicly expose him and these 30 individuals rather than a bona fide effort to obtain the testimony of the petitioner in aid of legislation. To this end, petitioner served upon the Clerks of the Committee and of the House of Representatives identical sub-

poenas calling for all the information in the possession of the Committee relating to petitioner and the persons named in the questions set out in the indictment. Despite the fact that petitioner made out a *prima facie* case of exposure by proof that the Committee asserted an independent power of exposure (pp. 41-58, *supra*) and that the questioning of petitioner itself demonstrated that the Committee was acting under that asserted independent power of exposure here (pp. 58-64, *supra*), the District Court nevertheless ruled that the subpoenaed documents were not relevant to the issues in the case (R. 19). In effect, what the District Court held was that one indicted for contempt of a Committee would not be permitted to prove that the Committee was engaged in exposure rather than in investigation in aid of legislation.

The subpoenas having been quashed, petitioner offered to prove in the trial court, through the material which was described in the subpoenas, that the Committee "had in its files all the information which it sought to elicit from the defendant about him and each of the other 30 individuals referred to and, in fact, a great deal more such information" (R. 58). In connection with this offer of proof, petitioner submitted the extensive references to these 30 individuals which were to be found in the Committee's public reports and hearings (R. 94-109). While these references were many and varied, they were but a minute part of the total sum of knowledge which the Committee had about the list of names which was read to petitioner. According to government counsel, the Clerk of the Committee informed him that the material was so voluminous that it would take three analysts two weeks to assemble it, and a truck to bring it to the courthouse (R. 46-47). If the Committee's purpose was to inform itself, and through itself the Congress, on matters in aid of legislation, it surely had no need to require petitioner to come

from his home and place of employment merely to identify and expose individuals about whom the Committee had more information than the petitioner had or was questioned about. The calling and public questioning of petitioner under the circumstances of full prior knowledge on the part of the Committee is itself a demonstration that the Committee was performing its exposure function and not its legislative function in this line of questioning. Taken together with the Committee's asserted power of exposure and its lack of interest or concern in questioning petitioner along any except exposure lines, the demonstration is overwhelming.

The testimony of Committee counsel makes it clear that the Committee had no settled practice with respect to prior search of its own files before using compulsory process to obtain information (R. 49-51). The ironic fact is that, although it maintained voluminous files (p. 50, *supra*), boasted of its "comprehensive records" concerning "individuals",[51] and pointed out the effect of their use in arguing for its annual appropriation,[52] the Committee failed to exhaust the possibilities in those files in order to save a citizen the expense, inconvenience and adverse publicity of coming to testify, under compulsory process, about what the Committee already knew. Obviously petitioner was called not to give testimony relevant to a legislative purpose, but to play the role assigned to him by the Committee in its staging of the public identification of individuals.

The testimony of Committee counsel as to whether the files had been consulted at all in this case was evasive and inconclusive, and, consistent with the District Court's apparent position that proof of exposure was irrelevant (R. 19), petitioner was not permitted to probe fully into his

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[51] R. 128, Annual Report for 1949, p. 18

[52] R. 168, 100 Cong. Rec. 2173.

claimed lack of memory on this point (R. 51). Even so, counsel's testimony boils down to a statement that counsel was always briefed by investigators prior to a hearing; that therefore it must have been done in this case; that he would know what the investigators told him "but whether that was all the information in the Committee's files, I wouldn't know, because I don't know what is in the mind of the investigator" (R. 52). Mr. Kunzig carefully refrained from stating that he or anybody else made an exhaustive search of the files which the Government states would take three analysts two weeks just to assemble; it is clear that Mr. Kunzig could not have been given all the information in the files of the Committee, for if he had been given the information contained in a truckload of papers, as recently as a year before, he most certainly would have remembered the fact of receiving the information even if not its contents.[53] The Committee not only did not know what it had in its files; it did not care.

The Committee clearly should have searched its files before calling or questioning petitioner. Its failure to do so and its insistence on petitioner's public testimony without knowing or caring about the extensive prior information it had obtained is further proof, if any be needed, that the Committee was engaged in exposure rather than investigation in aid of legislation in its questioning of petitioner.

The Committee apparently utilizes its files for all purposes except to avoid use of compulsory process against one whom it seeks to expose and through whom it seeks to expose others. The Committee, for example, utilizes its files

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[53] If even a cursory search of the files had been made, the duplication and misspelling of names in the questioning and indictment would have been avoided. E.g., Lee Landbaker for Leland Baker; Herb Marsh for Herb March; Charles Hobbe for Charles Hobbie; duplication of Marie Wilson and Mrs. John Wilson (R. 100, 102, 99, 109).

to answer thousands of requests yearly from Congressmen (R. 119, *Annual Report for 1953*, p. 133). The Committee utilizes its files on occasion even to answer "requests made by private individuals who show a sincere and genuine need for information . . ." (R. 123-124; *Annual Report for 1952*, p. 78; see also Cushman, *op. cit. supra*, p. 197). Its failure to use its files before calling petitioner only reinforces the overwhelming proof already made in this case that the Committee was not seeking information at all but was engaging in its asserted power of exposure.

We do not suggest that the Committee was without authority to obtain corroborative evidence relevant to a legislative matter.[54] Nor do we suggest that the Committee was without authority to compel oral testimony on a legislative matter simply because it already had some information in its files concerning that matter. What we do maintain is that the "truckload" of information in the Committee files concerning petitioner and the persons about whom he was asked and the failure of the Committee to make a thorough review of this truckload of information before calling petitioner is added evidence that the Committee's sole concern was to use petitioner as a vehicle of its policy of public exposure. When taken together with the other evidence to this effect already reviewed in this brief, there can be little doubt that the Committee was questioning petitioner solely in aid of its asserted power of exposure.

A Committee which exercises its power of compulsory process to bring a citizen to testify before it without even making a thorough review of the truckload of information in its own files is exceeding its Constitutional power in another respect. It is not acting with the "least possible

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[54] It might be noted here that, when petitioner challenged the authority of the Committee (R. 85), no suggestion was made that the information sought from petitioner was desired as corroborative evidence for any purpose, much less a legislative purpose (R. 86, 90-91).

power." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Marshall* v. *Gordon*, 243 U.S. 521, 541. This limitation has been explained as follows:

> "A court, for example, has no general authority to force witnesses to testify; it has the power to do so only when the witness' testimony is needed to help dispose of the controversy which the court is called upon to determine. Equally, the investigative power of Congress or any other legislature extends only to matters which bear an intelligible relation to the legislative function. Respect for privacy and the rights of individuals against oppressive inquisition are fundamental to our way of life; the inroads of investigations must be limited to what is necessary to give the legislature the information it needs in order to discharge its functions. 'The least possible power adequate to the end proposed' is the touchstone in determining whether an individual may be compelled to reveal matters otherwise private and protected from public disclosure."[55]

We do not suggest the precise meaning to be given to the "least-possible-power" limitation. It probably does not prevent a congressional committee from procuring corroborating testimony on matters of substantial importance. It probably does not prevent the compulsory procuring of a wide range of opinions and experience on a matter of significance. But we think the "least-possible-power" rule has no meaning at all if it does not prevent a committee which has extensive information in its possession on the long-past affiliations of a group of individuals from forcing another individual to repeat publicly, under threat of criminal prosecution, what the committee already has in its files.

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[55] Taylor, *Grand Inquest* (1955), p. 57.

D. *The Majority of the Court Below Erred in Failing to Consider Petitioner's Proof of Exposure*

Petitioner made these same three arguments on exposure —(A) that the Committee asserted an independent power of exposure, (B) that the Committee's questioning of petitioner and colloquies with him demonstrated an unmistakable purpose of exposure, and (C) that the Committee had available in its files, which it failed to examine, the information it sought from petitioner—in both the trial court and the court below. The District Court refused to admit petitioner's evidence under arguments (A) and (C) and to consider the evidence under (B). The court below summarily rejected petitioner's contention under (A) with the comment that petitioner's proof of the Committee's assertion of the power of exposure "is not evidence" (see pp. 42-43, *supra*); it gave arguments (B) and (C) a silent rejection.

The majority below thus refused to consider the evidence of exposure presented by petitioner and to pass on the fundamental issues raised. Instead, the majority opinion below seems to hold (i) that there *could* always be a valid legislative purpose in a congressional committee asking witnesses whether certain persons had once been members of the Communist Party and (ii) that, therefore, since there *could* have been a valid legislative purpose, proof that there was in fact no valid legislative purpose in particular questions, but only a purpose to expose, does not invalidate congressional committee action. In this vein, the majority opinion states (R. 178):

> " . . . A majority of the court is of opinion that Congress has power to investigate the history of the Communist Party and to ask the questions Watkins refused to answer. It would be quite in order for Con-

gress to authorize a committee to investigate the rate of growth or decline of the Communist Party, and so its numerical strength at various times, as part of an inquiry into the extent of the menace it poses and the legislative means that may be appropriate for dealing with that menace.[56] Inquiry whether thirty persons were Communists between 1942 and 1947 would be pertinent to such an investigation. The questions asked Watkins *could* be asked for a valid legislative purpose." (Emphasis supplied.)

Nowhere does the majority opinion deal with the issue whether the questions asked Watkins were in fact asked for a valid legislative purpose; the entire emphasis, as indicated in the quotation above, is that "the questions asked Watkins *could* be asked for a valid legislative purpose." Thus, the majority opinion, after quoting the opening statement of the Chairman of the Committee many weeks before petitioner testified, states that "the purpose of the Committee's hearing was to aid it [the Committee] in its study of a proposed amendment to the Internal Security Act of 1950." (R. 181)[57] Here again the majority opinion is

[56] All apart from the fact that this information was already available to the Committee from the Federal Bureau of Investigation's regular yearly reports to the Congress on the membership of the Communist Party, the questioning of petitioner itself negatives any such purpose on the part of the Committee. Nowhere did the Committee ask petitioner for the names of other Communists in his union or for any estimate of the total number of Communists. Nowhere was it suggested that the question under inquiry concerned "the history of the Communist Party" or the "rate of growth or decline of the Communist Party." All the Committee wanted was petitioner's testimony concerning particular persons whom it desired to expose.

[57] The bill to which the Chairman apparently referred in his opening statement quoted by the court below was one to amend the Internal Security Act of 1950 to deprive Communist-infiltrated labor unions of the use of the National Labor Relations Board. The bill pending at the time of the Chairman's statement and of petitioner's appearance was H.R. 7487, 100 Cong. Rec. 763. No hearings were held or other action ever

dealing in the realm of what *could be,* not what *was.* The fact that the Chairman of the Committee referred to a proposed amendment to existing legislation in the course of a lengthy, *pro forma* opening speech many weeks (R. 43-44) and many witnesses before petitioner testified, hardly demonstrates that the purpose of the particular questions petitioner refused to answer was to elicit information about this amendment.

In fact the proof is clearly to the contrary.[*] Immediately after the opening statement in Chicago, which included the passing reference to the bill (R. 44) upon which the court below relied, the Committee took testimony from six witnesses on the Federal employee security program and various college and farm activities. *Investigation of Communist Activities in the Chicago Area—Parts 1 and 2. Hearings before the Committee on Un-American Activities,* House of Representatives, 83rd Cong., 2d Sess. When petitioner finally testified, no questions were asked him in any way relating to the amendment which is now offered as justification for petitioner's questioning, or any other. The Committee's failure, for example, to question petitioner about the matter of compliance with

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taken on this bill. Subsequently Congressman Reed of Illinois introduced H. J. Res. 528, 100 Cong. Rec. 6705, another bill dealing with Communist-infiltrated labor unions; hearings were held on this bill by the House Judiciary Committee, but an adverse report was filed on the ground that the Committee did not possess sufficient information. H. Rep. No. 2280, 83rd Cong., 2d Sess., p. 3. On July 6, 1954, the Senate Judiciary Committee reported favorably on S. 3706, a bill to provide for hearings on and penalties for Communist-infiltrated labor organizations. Two days later, on July 8, 1954, two-and-a-half months after petitioner's hearing, Congressman Velde introduced H. R. 9838, a bill identical with S. 3706, and it was this bill which was reported out on August 9, 1954 (H. Rep. No. 2651, 83rd Cong., 2d Sess.), and became law on August 24th as part of the Communist Control Act of 1954. P. L. 637, 68 Stat. 775, 50 U.S.C. 781, 792a. As indicated in the body, the evidence in this case makes clear that the questioning of petitioner had nothing whatever to do with the bill that was then pending before the Committee or the bill introduced later, which was finally enacted.

the Taft-Hartley Act, after petitioner himself brought this matter before the Committee (R. 75), is particularly significant, for the bill in question dealt with the same general subject-matter of Communist infiltration of labor unions. But, as the dissenting opinion pointed out, what the Committee wanted was the identification of persons who may have been Communists before that time, not to discover whether the Taft-Hartley Act "is adequate or requires strengthening," which would have been relevant to the proposed bill (R. 192). When petitioner challenged the Committee's action as one of exposure (R. 86), the answer that came from the Committee was not that the desired testimony was relevant to any bill concerning Communist infiltration into labor unions or otherwise, but simply a veiled and not too subtle assertion of the power of exposure (see pp. 62-63, *supra*). Furthermore, the Committee report on the bill to which the court below refers did not claim there had been any hearings on the bill (H. Rep. No. 2651, 83d Cong., 2d Sess.); the minority report stated categorically that no hearings had been held. H. Rep. 2651, Part 2, 83rd Cong., 2d Sess. One of this minority who stated that no hearings had been held, Congressman Frazier, was present at petitioner's interrogation (R. 70) and would have been in a position to know if the questioning had been directed in any way at the amendment to the Internal Security Act.[58]

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[58] One other argument by the court below is worth noting. "Having volunteered an attack on the credibility of a prior witness," wrote the majority below, "appellant could not later refuse to answer questions concerning Communist Party membership of other union associates of appellant and of the prior witness on the ground that this particular phase of testimony was beyond the scope of the Committee's investigating power." (R. 184). But petitioner volunteered nothing. He was subpoenaed to testify at a hearing before the Committee on Un-American Activities. Two earlier witnesses before that same Committee had accused him of being a member of the Communist Party and, rejecting the shield of the Fifth Amendment (R. 85), he intended to testify to

Thus, what we have here is the Committee Chairman's passing reference to a pending bill in a catalog of enacted and pending legislation enumerated by the Chairman as part of a formal opening statement to a set of hearings on a diversity of subjects (see p. 72, *supra*). Then, many weeks later, petitioner was interrogated in a manner and under circumstances which make clear that the questions he refused to answer were not asked to elicit information concerning that pending bill. The reliance of the court below upon the Chairman's passing reference to the bill when the record clearly reveals that the examination of the petitioner was in no way related or pertinent to such bill, not only preferred form to substance, but put the court in the position of attributing to the Committee a purpose which it never claimed for itself. The court's action was clearly in the realm of what "could" have been, not what was.[59]

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the contrary. Because of the risk of a perjury charge in view of the testimony of two adverse witnesses, he had prepared a careful statement setting forth the facts as he remembered them (R. 37, 39-40, 74-75). After Committee counsel had interrogated petitioner about Spencer's testimony against him, which included Rumsey's participation in Communist activities, and was about to go into Rumsey's testimony (R. 73-77), petitioner read his prepared statement to the Committee (R. 75). It volunteered nothing; it did not attack the credibility of Rumsey and Spencer other than to deny their testimony concerning petitioner's alleged membership in the Communist Party. Petitioner's efforts to defend himself against a charge of perjury, when being forced to testify under subpoena, is hardly a "voluntary" attack upon the credibility of anyone or a waiver of his right to refuse to proceed further. Furthermore, since the issue here is one of legislative authority and jurisdiction rather than self-incrimination (*cf. Rogers* v. *United States*, 340 U.S. 367), the question of waiver does not arise. *Cf. United States* v. *Corrick*, 298 U.S. 435; *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48, 62.

[59] The court below cited no authority, nor has any been adduced by counsel for either party, in support of the "could be" theory of Congressional investigative power. Since no court has directly held that the question was what a committee could have been doing, not what it was doing, it has been somewhat difficult to find opposing authority. The Court's attention should be invited, however, to a recent district court decision on this very point. On April 19 1956, District Judge Richmond

Undoubtedly there may be instances in which it would be difficult to determine whether a congressional committee was interrogating a witness in order to procure information in aid of legislation or for exposure unrelated to any legislative purpose. But the difficulty of drawing a line in close cases should not deter this Court from its duty to state "where the individual's freedom ends and the State's power begins." *Thomas* v. *Collins*, 323 U.S. 516, 529. Certainly the instant case involving clear proof of exposure unrelated to a legislative purpose is a sound vehicle for a declaration that there is a field of exposure for exposure's sake which congressional committees may not lawfully enter.

The apparent holding of the court below—that the possibility that certain questions *could* have had a valid legislative purpose under certain circumstances was sufficient to justify Committee interrogation, whether or not such circumstances existed and in the face of proof of their nonexistence—renders academic and meaningless the authoritative decisions of this Court limiting the investigative power. If the ruling below stands, there will be no limits to the exposure powers of congressional committees for *ex post facto* legislative rationalization is always possible. If petitioner's showing of the Committee's purpose of exposure is not deemed adequate, we doubt that it can be made in any case. The Committee will hardly, in a proceeding likely to end in the courtroom, be more explicit in its purpose of exposure for the sake of exposure than it was here; *pro forma* opening statements listing past and pending bills can always be made in a further effort to turn a legislative

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B. Keech, in acquitting Aldo Icardi of perjury, stated that "if the Committee is not pursuing a bona fide legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal,' even though that very testimony be relevant to a matter which *could* be the subject of a valid legislative investigation." (Emphasis supplied.) *United States* v. *Icardi*, 140 F. Supp. 383, 388.

front to the courts while proclaiming the virtues of exposure to Congress and the public. We do not believe that the concern expressed (*United States* v. *Rumely*, 345 U. S. 41, 44) and limitations outlined (*Quinn* v. *United States*, 349 U. S. 155, 160-161) by this Court in recent opinions were intended to be academic and incapable of demonstration. Yet, if the showing made here is not deemed adequate, there can be no effective judicial limitations in the very field of inquiry where they are most needed.

III

The Questions Petitioner Refused to Answer Were Outside the Scope of the Committee's Authorization

A. *Introduction*

Counsel for petitioner recognize that, in presenting the constitutional argument concerning the Committee's purpose of "exposure" (Point I) and the factual support for that constitutional argument (Point II) prior to a consideration of the issue of statutory construction (Point III), they are following a somewhat unorthodox order of presentation. We have deemed this unorthodoxy justifiable for two reasons.

In the first place, we believe that the arguments presented in Points I and II have demonstrated beyond the possibility of successful rebuttal that a congressional committee may not constitutionally compel testimony for the sole purpose of exposure and that the Committee on Un-American Activities was seeking to do just that in its attempts to force answers to the questions addressed to petitioner. The fact that neither the trial nor appellate courts nor the Government has provided any direct refutation to Points I and II further convinces us of their undoubted validity. In contrast, the issue of statutory construction raises an extreme complex and difficult question of con-

gressional intent arising from possible ratification by the House of Representatives of the broad interpretation of the Committee's authorization, upon which the Committee has acted over the years with the knowledge of the members of the House. Counsel deemed it advisable to present first, and to place their primary reliance upon, what they believe to be their clearest and least refutable arguments.

In the second place, constitutional considerations will themselves affect the construction question, for they will determine whether the Committee's authorization should be given a broad or a narrow construction.[69] Thus, Chief Judge Edgerton and Circuit Judge Bazelon in their opinions below, both as the majority of the initial panel and minority of the full bench, first reviewed the evidence of exposure presented by petitioner (R. 190-196) and concluded that if "obliged to decide what the Committee's purpose was in asking the questions Watkins would not answer, we might be forced to conclude that the Committee asked them for the sole purpose of exposure" (R. 196). Having reached this conclusion, the dissenting judges below construed the authorization of the Committee narrowly (R. 196) in order to avoid the constitutional issues involved (*cf. United States* v. *Rumely*, 345 U. S. 41), and held that the authorization of the Committee, so construed, did not cover the questions petitioner refused to answer (R. 196-197).

Counsel for petitioner would have preferred, as a sheer matter of advocacy, to rely entirely on the clear-cut and overwhelming constitutional arguments against exposure. But we are mindful of our responsibility to this Court to give recognition to the doctrine that constitutional issues

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[69] Likewise, the factual demonstration of the Committee's exposure purpose (Point II) would bring the questioning outside the Committee's authorization if such purpose has not been ratified by the House. See pp. 80-82, *infra*.

are to be avoided when a case can properly and fairly be decided on a more limited basis (*Peters* v. *Hobby*, 349 U.S. 331; *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129), and to the closely related rules that statutes are to be construed so as to avoid constitutional doubts (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *C. I. O.*, 335 U. S. 106), or the attribution to Congress of an intent to sanction arbitrary or constitutionally questionable practices or procedures. *Cole* v. *Young*, 351 U. S. 536. We recognize, too, that these judicial rules of self-limitation have perhaps their greatest strength when the constitutional issues before the Court are as fundamental as those in the instant case. The questioning of petitioner raises far-reaching issues of the allocation of power between coordinate branches of the Government and difficult problems of the accommodation of the congressional power of investigation and the rights guaranteed by the First Amendment (see Point IV). In these circumstances the clarity of the constitutional argument and the complexity of the interpretative argument might not be deemed adequate reason by this Court for counsel's failure to brief and argue the question of statutory construction and the Court might well have requested such action on its own motion. *Cf. Peters* v. *Hobby*, 349 U. S. 331. We therefore deem it incumbent upon us to present to the Court the authorities and reasoning in support of the argument that the Committee has exceeded its own governing authorization in the instant case and that no legal ratification of the Committee's broad interpretation of its charter has ever been accomplished.[61]

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[61] The scope of the Committee's jurisdiction and the pertinency of the questions propounded to petitioner were raised by petitioner in the District Court (Tr. 187-190). Having lost in the District Court, petitioner conceded the authorization point in the original argument before the three-judge panel of the Court of Appeals in the belief that the ratification

B. *The Questions Petitioner Refused to Answer Do Not Fall Within the Language of the Committee's Authorization*

The substantive authority of the Committee on Un-American Activities of the House of Representatives is found in the following language:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto *that would aid Congress in any necessary remedial legislation.*"[62] (Emphasis supplied.)

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argument was compelling. When the case was reargued before the Court of Appeals sitting *en banc*, petitioner, while relying primarily on the constitutional arguments, argued in support of Judge Edgerton's opinion that the authorization should be interpreted narrowly and that the questioning of petitioner was therefore beyond the Committee's authority. The majority of the full court explicitly decided that the questions asked petitioner were authorized by the resolution (R. 179). Petitioner in his Petition for a Writ of Certiorari framed the Questions Presented in constitutional terms, but concluded that, "whether proof of exposure be deemed a ground for so narrowly construing the resolution as to exclude the questions at which petitioner balked or be deemed a basis for holding the action of the Committee under the resolution beyond the powers of a Congressional Investigatory Committee, a clear-cut case of exposure has been made out here" (p. 33). In view of the traditional policy of this Court to avoid constitutional questions wherever possible, to which we have already adverted, we have decided to set forth for this Court the arguments supporting a construction of the authorization which would exclude the questions petitioner refused to answer.

[62] House Rule XI adopted by H. Res. 5, 99 Cong. Rec. 15, 18 (1953) represents the delegation of authority by the House of the 83rd Congress to the Committee on Un-American Activities. The substantive language of the relevant portion of the Rule is the same as that found in Section

Viewed as an exercise of the Committee's asserted power to expose (Point II), the questions petitioner refused to answer were outside this substantive authority. For, whatever its utmost scope and outer limits, the language of the resolution cannot be deemed to include a mandate to engage in exposure.

Certainly the language on its face contains no such grant of authority for there is no reference anywhere to "exposure." Nor is there any language from which a power to expose can be derived. On the contrary, the wording of the authorization negatives any such implied power. The Committee may investigate (i) the extent, character and objects of un-American propaganda activities, (ii) the diffusion of subversive and un-American propaganda and (iii) other questions in relation to (i) and (ii) "that would aid Congress in any necessary remedial legislation." We

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121(b) of the Legislative Reorganization Act, Chapter 753, 60 Stat. 812, 828 (1946) and in the amendment to the House Rules which made the Committee on Un-American Activities a permanent committee of the House. 91 Cong. Rec. 10, 79th Cong., 1st Sess. (1945). This language in turn derived from that of the original resolution creating the Special Committee to Investigate Un-American Activities, H. Res. 282, 83 Cong. Rec. 7568, 75th Cong., 3rd Sess. (1938). The successive resolutions, which continued the Special Committee, granted to it the "same power and authority" as that set out in the original resolution. H. Res. 26, 84 Cong. Rec. 1098, 76th Cong., 1st Sess. (1939); H. Res. 321, 86 Cong. Rec. 572, 76th Cong., 3rd Sess. (1940); H. Res. 90, 87 Cong. Rec. 886, 77th Cong., 1st Sess. (1941); H. Res. 420, 88 Cong. Rec. 2282, 77th Cong., 2d Sess. (1942); H. Res. 65, 89 Cong. Rec. 795, 78th Cong., 1st Sess. (1943). The last renewal operated for two years. The language of the resolution creating the Special Committee, familiarly known as the Dies Resolution, is similar to and modeled upon that of the so-called Dickstein Resolution, H. Res. 198, 78 Cong. Rec. 4934, 73rd Cong., 2d Sess. (1934). See pp. 82-84, *infra*. Thus, the present permanent Committee on Un-American Activities was preceded by the Special Committee to Investigate Un-American Activities. We will, in this brief, refer to the Committee as it existed during the period 1938-1945 as "the Special Committee."

Since the relevant language has been found successively in resolutions, a statute, and the House Rules, we refer to it generally as the Committee's "authorization."

read the quoted phrase as modifying the powers described in (i) and (ii) as well as in (iii), for any other reading "is to infer Congressional idiosyncrasy." *Keifer & Keifer* v. *R. F. C.*, 306 U.S. 381, 393. What possible reason would actuate the House to require that investigations of the subsidiary "other questions" under (iii) be limited to those that would have a connection with necessary remedial legislation, but to omit that requirement with respect to the primary subjects of investigation outlined under (i) and (ii)?

This analysis is fortified by statements of members of the House indicating that the intent of the House, in creating the Special Committee, was to procure the facts which would support legislation and not to authorize smear campaigns and similar exposure activities.[63] Congressman Healey, during the lengthy debates in 1939 when for the first time it was proposed to extend the life of the Special Committee, stated his position as follows (84 Cong. Rec. 1115):

> "Mr. Speaker, I urge the adoption of this resolution to continue the inquiry by this committee. And if it is so adopted, I hope that the House will make it plain that it desires the committee to eliminate the unnecessary showmanship, sensationalism, and 'appeal to the grandstand' that has done so much to impair the effectiveness of the committee's work and to buckle down to a serious and judicial factual investigation which may provide a sound basis for future action by Congress. [Applause.]"

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[63] See statements of Robsion, 83 Cong. Rec. 7584 (at the time the Special Committee was first authorized); Sabath, 84 Cong. Rec. 1102, Keller, 84 Cong. Rec. 1108, Hook, 84 Cong. Rec. 1114 (at the time the first renewal of the life of the Special Committee was being considered). Congressmen Healey, Sabath, and Robsion were in favor of the creation of the Special Committee; Congressmen Keller and Hook took the opposite view. Thus representatives of both the proponents and opponents of the original resolution agreed on this point.

The Committee's investigative authority would thus appear to be limited by its own terms to matters which would aid Congress in the consideration of remedial legislation and to exclude questions asked solely for exposure purposes. If (i) and (ii) are not so limited, the authorized investigations are of highly doubtful validity, for a contrary reading would require one to ascribe to the House an intention to encroach upon, or to come close to encroaching upon, areas forbidden to Congress by the Constitution. *Cf. United States* v. *C. I. O.*, 335 U.S. at 120. Such a dubious mandate is not to be read into the Committee's authority unless it is inescapably required by the language.

In a narrower sense, the questions upon which petitioner's conviction is based appear to be unauthorized by the language of the resolution, which is confined to propaganda and propaganda activities. The original intent of the House, to create a committee which would be concerned with investigations of propaganda activities, is evident from the fact that the language of the authorization is obviously modeled upon [64] that of the Dickstein resolution which had established the McCormack Committee in 1934. The changes in the language from that of the Dickstein resolution broaden the definition of the kinds of propaganda and propaganda activities to be investigated; they do not extend the limitation of the authority conferred beyond propaganda and propaganda activities. The discussion which preceded the adoption of the Dickstein resolution can thus

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[64] See 83 Cong. Rec. 7568-7586. The Dickstein resolution created a committee

> ". . . for the purpose of conducting an investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States, (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

illuminate the language under consideration; it reveals that the House at that time was interested in procuring information concerning foreign and particularly Nazi propaganda, and did not authorize any investigation beyond this limited and defined field[65]. Congressman Dickstein summarized the purpose of his resolution as follows (78 Cong. Rec. 4946):

> "This special investigating committee should seek to accomplish three primary objects: First, ascertain the facts about methods of introduction into this country of destructive, subversive propaganda originating from foreign countries; second, ascertain facts about organizations in this country that seem to be cooperating to spread this alien propaganda through their membership in this country; third, study and recommend to the House appropriate legislation which may correct existing facts and tend to prevent the recurrence of a similar condition in the future."

The report of the committee[66] appointed pursuant to this resolution ultimately resulted in the passage of the act requiring the registration of foreign propagandists. P. L. 583, 75th Cong., 3rd Sess., 52 Stat. 631. It is significant that Congress provided for identification of foreign propaganda agents by law, and did not regard such identification

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[65] References to subversive propaganda, foreign propoganda and Nazi propaganda and propagandists as the projected field of committee activity are frequent in the debates. See 78 Cong. Rec. 4934, 4937, 4938, 4940, 4944, 4945.

[66] H. Rep. No. 153, 74th Cong., 1st Sess. (1935). This report gave a factual description of the propaganda activities of various Nazi and Communist organizations and of some "native" propaganda organizations which were alleged to have been instigated from foreign countries. It contained no lists of individuals; it was not preoccupied with identification; it did not judge guilt or innocence. The report concluded with a number of specific legislative recommendations.

as the function of the Congress or any committtee thereof.

Consistent with its adoption of the substance of the Dickstein resolution, the House, when in 1938 it first authorized the Special Committee, indicated its great concern with the acceleration of "propaganda" activities, particularly those of the Bund.[67] Congressman Dies himself, in urging the adoption of the resolution, emphasized the existence of Bund activities. 83 Cong. Rec. 7568-7570. Congressman Eberharter stated that he was depending upon the Committee not to use its broad power for any other purpose than to ascertain the truth or falsity of the charges about propaganda (83 Cong. Rec. 7583).

Thus there is considerable evidence that it was the intent of the House in creating the Special Committee and in limiting its authority in the terms to which the Committee is still limited, to confine the Committee's investigation to propaganda and propaganda activities and not to extend such investigations to the political and organizational affiliations of individuals in years long past.

When the questioning of petitioner is examined in the light of an inquiry thus limited, the lack of pertinence is evident. John Watkins was not asked about the dissemination of propaganda by or in the unions to which he belonged in his many years in the labor movement. He was not asked about propaganda activities by the 30 persons who are named in the indictment. He was not asked about those individuals as the objects of propaganda nor was he questioned concerning the extent or character of propaganda to which they might have contributed.[68]

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[67] See statements of Thomas, 83 Cong. Rec. 7577; Ford, 83 Cong. Rec. 7583; Robsion, 83 Cong. Rec. 7583-84.

[68] No contention can be raised that if petitioner had cooperated with the Committee on the few questions he refused to answer, such questioning would have followed. Preliminary questions must be of themselves relevant. *Bowers v. United States*, 202 F. 2d 447, 452 (C.A.D.C., 1953).

What the Committee did not ask is thus significant in determining whether it was engaged in an authorized investigation of propaganda and related activities. What it did ask is equally significant. It asked petitioner about the Communist Party membership of certain individuals during the years 1942-1947. A number of those individuals were not even union members.[69] As to them, there was clearly no relevance to propaganda activities in unions. And the identification of those individuals who were members of unions in 1942-47 could add nothing to the Committee's knowledge of current Communist propaganda activities in unions. For one thing, the lapse of time would in itself render such evidence regarding individuals practically meaningless; defection from the Communist Party has been widespread.[70] For another, the type, extent and character of Communist activities in unions during the period of our country's war-time friendship with the Soviet Union were thoroughly different from Communist methods of operation in more recent years. So, to whatever extent the naming of individuals can ever be relevant, the activities of the individuals about whom petitioner was questioned would in this instance shed no light on anything the Committee might really have wanted to know with respect to propaganda activities.

We submit that the questions petitioner refused to answer fall outside the scope of the language of the Committee's authorization on the basis of any fair reading of the resolu-

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Moreover, petitioner had indicated by his original statement and by his answers to the general questions which the Committee asked that he would cooperate with the Committee to the extent of answering relevant questions of substance, not mere identification.

[69] Theo Kruse, a "beauty parlor operator" (R. 99); Murray Levine, "just citizens" (R. 101); Sarah Levine, "just citizens" (R. 101); Olaf Lidel, a "watchmaker" (R. 101); Harold Metcalf, "a retired machine worker" (R. 103); John and Marie Wilson, "only Communists" (R. 109).

[70] See pp. 112, *infra*.

tion; they certainly fall outside the authorization if the authorization is to be construed so as to avoid constitutional doubts or the imputation to Congress of a constitutionally questionable intent. *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366; *United States* v. *C. I. O.*, 335 U. S. 106; *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Harriss*, 347 U. S. 612. Were it not for the possibility that the House has ratified the broad construction of the Committee's authority which the latter has asserted and acted upon over the years, there could be no question as to any other interpretation of the resolution. But, as already indicated, ratification in these circumstances is a complex and difficult subject and is rendered particularly so by the continued public assertion by the Committee of its power to expose, an assertion which we have documented and demonstrated in Point II of this brief and which was unquestionably known to the members of the House. We turn now to the question of ratification.

C. Ratification

The House of Representatives has had occasion to deal with the question of the Committee's authority many times. It has been called upon to extend the life of the Special Committee on five occasions.[71] It has considered and approved a resolution establishing the Committee on Un-American Activities as a permanent committee of the House.[72] It has made at least nineteen annual appropriations to the Committee to carry on its investigations,[73] and since the Com-

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[71] H. Res. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098 (1939); H. Res. 321, 76th Cong., 3d Sess., 86 Cong. Rec. 572 (1940); H. Res. 90, 77th Cong., 1st Sess., 87 Cong. Rec. 886 (1941); H. Res. 420, 77th Cong., 2d Sess., 88 Cong. Rec. 2282 (1942); H. Res. 65, 78th Cong., 1st Sess., 89 Cong. Rec. 795 (1943).

[72] 79th Cong., 1st Sess., 91 Cong. Rec. 10 (1945).

[73] 75th Cong., 3d Sess., 83 Cong. Rec. 8637 (1938); 76th Cong., 1st Sess., 84 Cong. Rec. 1288 (1939); 76th Cong., 3d Sess., 86 Cong. Rec. 688

nittee became a permanent committee, it has approved the Legislative Reorganization Act [74] which included language identical with the prior resolution describing the Committee's scope of authority. It has five times, at the opening of a new Congress, approved House Rules which included provision for the Committee on Un-American Activities as a standing committee having the authority set out above.[75]

The contention can be made with force that the House, through these extensions, reenactments and appropriations, has ratified the Committee's own broad construction of its authority—both a construction which would authorize the Committee to engage in exposure and a construction which would expand the authority of the Committee in some undefined fashion beyond the normal limits of propaganda. The Committee itself has formulated its authority in varying terms, most frequently stating it to extend to the exposure of all subversive and un-American activities and has made this assertion of authority known to the members of the House through its reports, hearings and public statements (Point II A). Yet the varying and

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1940); 77th Cong., 1st Sess., 87 Cong. Rec. 899 (1941); 77th Cong., 2d Sess.; 88 Cong. Rec. 3754-58 (1942); 78th Cong., 1st Sess., 89 Cong. Rec. 110 (1943); 78th Cong., 2d Sess., 90 Cong. Rec. 762 (1944); 79th Cong., 1st Sess., 91 Cong. Rec. 1856 (1945); 79th Cong., 2d Sess., 92 Cong. Rec. 209 (1946); 80th Cong., 1st Sess., 93 Cong. Rec. 699 (1947); 80th Cong., 2d Sess., 94 Cong. Rec. 2405 (1948); 81st Cong., 1st Sess., 95 Cong. Rec. 044 (1949); 81st Cong., 2d Sess., 96 Cong. Rec. 3941 (1950); 82nd Cong., 1st Sess., 97 Cong. Rec. 1155 (1951); 82nd Cong., 2d Sess., 98 Cong. Rec. 2646 (1952); 83d Cong., 1st Sess., 99 Cong. Rec. 1358 (1953); 83d Cong., 2d Sess., 100 Cong. Rec. 2282 (1954); 84th Cong., 1st Sess., 101 Cong. Rec. 1074 (1955); 84th Cong., 2d Sess., 102 Cong. Rec. 1487 (1956).

[74] 60 Stat. 812.

[75] H. Res. 5, 80th Cong., 1st Sess., 93 Cong. Rec. 38 (1947); H. Res. , 81st Cong., 1st Sess., 95 Cong. Rec. (1949); H. Res. 7, 82nd Cong., st Sess., 97 Cong. Rec. 9 (1951); H. Res. 5, 83d Cong., 1st Sess., 99 ong. Rec. 15 (1953); H. Res. 5, 84th Cong., 1st Sess., 101 Cong. Rec. (1955).

loosely defined terms in which this authority has been asserted renders it difficult to conclude precisely what, if anything, the House may have ratified.

A careful examination and review of the debates in the House on the occasions of extension, reenactment or appropriation leads to the conclusion that there was no consistent congressional intent with respect to the precise scope of the Committee's authority. Many of the debates were long and heated, particularly in the early days of the Special Committee. Members of the House expressed their individual views as to the proper function of the Committee, but these views diverged widely, both among proponents and opponents of the Committee. In these circumstances, an "aye" vote in favor of the Committee's continuation or of the appropriation of funds for the Committee can hardly be said to be a necessary indication of approval of one construction of the scope of the Committee's authority as distinct from another and certainly not of a construction of the Committee's authority that goes beyond the plain meaning of the words of the authorization. *Biddle* v. *Commissioner of Internal Revenue*, 302 U.S. 573, 582.

Many of those in favor of continuation of the Committee spoke with praise of its widely-ranging exposure activities and it is fair to say, on a reading of all the debates, that those who so spoke were the preponderant group. For example, during the debate in 1939 when, for the first time the question of the continuation of the Special Committee came before the House, Congressman Taylor, speaking in favor of the resolution, described the Committee as

> "a committee which it is now proposed to crucify because it showed courage and determination in its efforts to expose radicalism in our midst." (84 Cong. Rec. 1101, 76th Cong., 1st Sess.)

Similarly, Congressman Youngdahl urged the continuation of the Committee, which would

> ". . . ferret out and drag into the daylight those enemies already here and tearing at the very heart of our democracy . . ." (84 Cong. Rec. 1113, 76th Cong., 1st Sess.) [76]

If these statements stood alone, one might be forced to conclude that the House had ratified some vague and imprecise assertion of broad Committee authority. But some members of the House indicated that they disagreed with this view of the Committee's authority and voted for the Committee in the understanding that it would restrict its activities to proper ones. On some occasions, indeed, these members stated that they had received assurances to that effect and were voting for continuation or appropriation on that supposition. Congressman Celler stated this view at the time of the debate on the first continuation of the Special Committee when he said (84 Cong. Rec. 1115, 76th Cong., 1st Sess.):

> "I shall vote for the final resolution primarily because recently, in a conversation I had with the gentleman from Texas, he agreed specifically that he had made errors and that he would not repeat them. I asked him a series of questions in order to bring out his future plans for the conduct of the committee. His answers were satisfactory."

When it was proposed to extend the life of the Committee for a second time, Congressman Sabath indicated that he

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[76] Among the other statements describing or lauding the Committee's exposure activities, see Smith, 84 Cong. Rec., 1113, 76th Cong., 1st Sess.; Thomas, 86 Cong. Rec. 578; Fish, 86 Cong. Rec. 593, 76th Cong., 3d Sess.; Ford, 88 Cong. Rec. 2295, 77th Cong., 2d Sess.; Thomas, 89 Cong. Rec. 797; Dies, 89 Cong. Rec. 806, 78th Cong., 1st Sess.; Busbey, 94 Cong. Rec. 2409, 80th Cong., 1st Sess., and those set out in Point IIA.

had voted for the appropriations the last Session "on the assurance that the investigation would be properly conducted" (86 Cong. Rec. 573, 76th Cong., 3d Sess. (1940)). During this same debate, Congressman Celler again commented that he would vote for the Committee only on assurances that lists of so-called Reds would not be repeated (86 Cong. Rec. 584).

In the light of these statements, evaluation of the series of actions by the House which might be said to constitute ratification of a broad reading of the Committee's authority becomes extremely difficult. An affirmative vote for the Committee has ambiguous characteristics which are rendered even more ambiguous by statements of those who sometimes voted for the Committee and sometimes against.

Congresswoman O'Day expressed the ambivalent views of some members toward the past work of the Committee and the question of continuing it:

> "Mr. Speaker, I voted originally for the creation of this committee. I believe that all subversive and un-American activities should be stamped out, but I did not vote for a continuation of the committee because of the un-American way in which it conducted the committee meetings. Unless we are assured that the committee will be conducted in a different manner in the future, I, for one, will not be able to vote for it. [Applause]" (86 Cong. Rec. 580; 76th Cong., 3d Sess.).

And in a still later debate, Congressman Clark, pointing out that he had heretofore supported the Dies resolution, announced that he would vote against it for the reason that

> ". . . I think it has gone far afield from the language of the original resolution and has come to be more of a supervisor of personnel of executive departments . . ." (89 Cong. Rec. 796, 78th Cong., 1st Sess.).

Congressman Voorhis made a similar announcement. 89 Cong. Rec. 807. Again in considering the appropriation for the second session of the 77th Congress (1942), various Congressmen expressed their disapproval of Chairman Dies' attack upon employees of the Board of Economic Warfare and pointed out that this action was a direct violation of their understanding of the authority granted to the Committee a few days before when it had been voted the fourth extension of its life (88 Cong. Rec. 3754-3758).

Further doubt is cast on the meaning which can be ascribed to an affirmative vote for the Committee on these many occasions by the frank remarks of Congressmen themselves to the effect that members of the House did not want to be accused of refusing to vote for legislation to investigate un-American activities.[77] And, lastly, some members critical of the Committee's actions, stated explicitly that they did not believe that appropriations to a permanent committee should be denied, but that other methods should be evolved to restrict the Committee to its proper sphere.[78] See statements of Morris, 94 Cong. Rec. 2406; Combs, 94 Cong. Rec. 2412, 80th Cong., 2d. Sess.

These cross-currents of intent, indicated by the members' own statements discussed above, serve to cast doubt on the propriety of applying the ratification and reenactment doctrine in this instance. An attempt to distill from these debates over a period of more than 15 years the "true" congressional intent and understanding with respect to the

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[77] See, e.g., statements of Eberharter, 86 Cong. Rec. 582; Gale, 89 Cong. Rec. 803; Keller, 84 Cong. Rec. 1110. Carr, *op. cit. supra*, p. 20, has noted "the fear of House members, often indicated in preceding [1945] years, that any kind of vote against the un-American activities investigation was politically unwise."

[78] Of course, the approval by the House of the citations for contempt proposed by the Committee, including that of petitioner here, offers no additional basis for a ratification argument. *United States* v. *Rumely*, 345 U.S. at 47-48.

language of the Committee's authorization illustrates the Court's recent statement that reenactment by Congress of language whose meaning is in dispute is "an unreliable indicium at best." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90; *Koshland* v. *Helvering*, 298 U. S. 441. While there is little doubt that the members of the House knew of the Committee's asserted powers and there is evidence that it intended to approve a broad construction of its resolution, the actions by the House may still be "wanting in that certainty and evident purpose which would justify [their] acceptance as a legislative declaration . . ." *Haggar Co.* v. *Helvering*, 308 U. S. 389, 400.

The scepticism with which the doctrine of construction by ratification may be viewed in many instances was given vivid illustration recently by this Court in *Peters* v. *Hobby*, 349 U. S. 331. Both petitioner and the Government there took the position that the President had acquiesced in the Loyalty Review Board's interpretation of its own authority.[79] This Court took the opposite view. It analyzed the language of the Executive Order which set forth the powers of the Loyalty Review Board and found that the power of post-audit in cases decided for the employee which the Board had asserted and exercised for many years was not authorized by that language. Mr. Chief Justice Warren, speaking for the Court, then said (at p. 345):

> "It is urged, however, that the President's failure to express his disapproval of Regulation 14 must be deemed to constitute acquiescence in it. From this, it is contended that the President thus impliedly expanded the Loyalty Review Board's powers under the Order. We cannot indulge in such fanciful speculation. *Noth-*

[79] Supplemental Memorandum of the United States, April 19, 1955; Supplemental Brief for Petitioner, April 21, 1955.

> *ing short of explicit Presidential action could justify a conclusion that the limitations on the Board's powers had been eliminated.* No such action by the President has been brought to our attention. There is, in fact, no evidence that the President even knew of the Board's practice prior to April 27, 1953, three weeks after the Board had notified petitioner of its intention to 'hold a hearing and reach its own decision.' "[89] (Emphasis supplied.)

The *Peters* case has three striking similarities to the case at bar on this question of extending doubtful authority by ratification or acquiescence. Thus, the *Peters* case involved an executive agency's interpretation of its grant of authority from the Chief Executive; the instant case involves a House Committee's grant of authority from the House. Secondly, in the *Peters* case the language of the Executive Order from which the Board's authority stemmed appeared incapable on its face of the construction which both parties argued had been given to it by ratification. 349 U.S. at 343. The authorization of the Committee here has the same fatal defect. The doctrines of ratification and acquiescence can render more certain that which is uncertain; they cannot change the normal meaning of words. As this Court has stated:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as

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[89] This last factor adverted to by the Court as negativing Presidential acquiescence is not, in the light of the entire opinion, the determining point. Indeed, it is noteworthy that both parties believed that the evidence showed that the President did have knowledge of the executive interpretation. Supplemental Brief of Petitioner, p. 16; Supplemental Memorandum of the United States, pp. 3-4.

another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events'." *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617.

Lastly, in the *Peters* case, the application of the ratification principle would have brought the Court to the determination of crucial constitutional issues; that same difficult duty would devolve upon the Court here. "Indeed, adjudication here, if it were necessary, would affect not an evanescent policy of Congress but its power to inform itself, which underlies its policy-making function. Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *United States* v. *Rumely*, 345 U. S. at 46.

It would appear difficult to say on the evidence here that the House has, by any ratification, "unequivocally" authorized exposure activities of the Committee in areas far removed from propaganda and propaganda activities. Although the preponderant position in the debates was undoubtedly an approval of the Committee's asserted broad powers, we have seen that there was a clearly-expressed minority view even among proponents of the Committee. While there can be little question that the House knew of the Committee's interpretation of its resolution, mere knowledge cannot be deemed ap-

proval in the face of this vigorous dissent. Moreover, it is one thing to regard renewal of authority or appropriation of funds with knowledge of the interpretation put upon that authority by a committee as a ratification of that interpretation if such interpretation could reasonably under all the circumstances be derived from the words used in the grant of authority. But it would be dangerous to imply any ratification of authority which could not reasonably be read into the language used by the House. In the instant case the words of authority cannot without distortion be construed to authorize the exposure and branding of individuals as public enemies for the sake of exposure and retribution (p. 80, *supra*). When these considerations are weighed together with the Court's policy to avoid constitutional questions wherever possible, the argument for ratification does not appear to lead irresistibly to a conclusion that there was an effective broadening of the Committee's authority beyond the fair intendment of the language. This Court has even suggested that a strained construction of language may be proper to eliminate difficult constitutional questions and to avoid ascribing to the Congress an intent to authorize an inquiry of dubious limits or procedures susceptible of grave abuse. *United States* v. *Rumely*, 345 U.S. at 47. It can certainly be questioned whether there would be any substantial strain in a rejection of congressional ratification on the facts presented here.

In view of the doubts cast upon the application of the doctrine of ratification to the facts at bar, this Court may deem it appropriate to avoid the constitutional issues already presented by finding against ratification and holding the questions petitioner refused to answer outside the scope of the Committee's authorization.

IV

The Compelled Disclosures Sought by the Committee Abridge Rights Protected by the First Amendment

We believe that preceding sections of this brief (Points II A, B, C, D) fully support the proposition that the questioning of petitioner by the Committee was an exercise of its asserted purpose of exposure. If, however, this Court were to reject petitioner's argument that the Committee's purpose was exposure rather than investigation in aid of a valid legislative purpose, it does not follow that the Committee could constitutionally require petitioner to reveal the past political affiliations of his one-time associates.[81] The absence of a legislative *purpose* clearly invalidates Committee action (Points I, II, III); its presence cannot validate governmental infringement on constitutional liberties. There still remains the question whether there was a Congressional *need* for the information sought and, if so,

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[81] The affiliations in question were no less political because they were with the Communist Party. Counsel for petitioner recognize that many leaders of the Party have been convicted of conspiracy under the Smith Act and that the Congress has declared the Party an agency of a hostile foreign power (see Communist Control Act of 1954, § 2, 68 Stat. 775). But these aspects of the Party do not preclude legitimate political association for the avowed purposes of the Party. Certainly, during the years from 1942 to 1947, the Party was a legal political party whose candidates appeared on the ballot in local and national elections. As this Court said in *Communications Assn.* v. *Douds*, 339 U.S. 382, 392:

> "Communists, we may assume, carry on legitimate political activities . . . By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) . . . has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment."

Furthermore, there is not presented here any refusal to testify concerning seditious or criminal activity or advocacy. Petitioner only refused to identify persons as former members of the Party; the Committee evinced no interest in anything beyond the names of former Party members. Under these circumstances, nothing is involved here other than presumably "legitimate political activities".

whether the need was sufficiently urgent and exigent to justify the infringement upon the First Amendment rights involved. We turn, therefore, to an examination of the question whether the Committee's compelled disclosures infringed upon First Amendment rights and if so, whether there was such a pervasive, overriding Congressional need for the information sought from petitioner as to remove the enforced disclosures from the protection of the First Amendment.

A. *First Amendment Protections Apply to Testimonial Disclosures Sought by Congressional Committees*

Even before this Court's decision in *United States* v. *Rumely*, 345 U.S. 41, it was manifest that congressionally-compelled testimonial disclosures are subject to First Amendment prohibitions. For congressional inquiry, like congressional legislative action, can have the effect of abridging the individual's freedom to espouse and express political views and to associate with others for political purposes—political rights which lie at the very foundation of the guarantees of the First Amendment.[82] This Court's historic decisions have given freedom of political belief, expression and association effective, paramount constitutional significance.[83] Nor does the Amendment merely preclude prohibition of the exercise of these rights; it likewise precludes "indirect discouragements"[84] flowing from

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[82] See, e.g., *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4; *Stromberg* v. *California*, 283 U.S. 359, 369. And see concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U.S. 357, 374-78.

[83] See, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183; *Thomas* v. *Collins*, 323 U.S. 516; *De Jonge* v. *Oregon*, 299 U.S. 353; *United States* v. *C.I.O.*, 335 U.S. 106, 129 (concurring opinion). *Cf. Communications Assn.* v. *Douds*, 339 U.S. 382, 393.

[84] *See Communications Assn.* v. *Douds*, 339 U.S. 382, 402.

restrictive governmental action of various kinds,[85] including those derived from governmentally-compelled public disclosures.[86] Thus, the decisions before *Rumely* clearly foreshadowed this Court's view that congressionally-compelled testimonial disclosures could present weighty First Amendment issues.

Any doubt as to the applicability of the First Amendment to congressional inquiries was resolved by this Court's declaration in *United States* v. *Rumely*, 345 U. S. 41, that compelled disclosure before congressional investigating committees of political activities and associations of individual citizens is subject to the prohibitions of the First Amendment.[87] There a congressional committee sought to compel identification of persons who made "bulk purchases" of books from an organization known as the "Committee for Constitutional Government". In deference to its "duty to avoid a constitutional issue" (p. 45) and since such compelled identification raised "doubts of constitutionality in view of the prohibitions of the First Amendment" (p. 46), a majority of this Court construed the Com-

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[85] E.g.: *Taxation: Murdock* v. *Pennsylvania*, 319 U.S. 105; *Grosjean* v. *American Press Co.*, 297 U.S. 233. *Licensing: Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495; *Kunz* v. *New York*, 340 U.S. 290. *Denial of "privileges": Wieman* v. *Updegraff*, 344 U.S. 183; see Willcox, *Invasions of the First Amendment Through Conditioned Public Spending*, 41 Cornell L. Q. 12.

[86] *Thomas* v. *Collins*, 323 U.S. 516, 538-40. *Cf. United States* v. *Harriss*, 347 U.S. 612.

[87] This principle has been accepted by the court below since its decision in *Barsky* v. *United States*, 167 F. 2d 241 *cert. den.* 334 U.S. 843. See *Rumely* v. *United States*, 197 F. 2d 166, 174. The compelling reasons for the applicability of the First Amendment are examined in some detail by Mr. Justice Black and Mr. Justice Douglas, concurring, in *United States* v. *Rumely*, 345 U.S. 41, 48; Judge Clark, dissenting, in *United States* v. *Josephson*, 165 F. 2d 82, 93 (C.A. 2, 1947) *cert. den.* 333 U.S. 838, and Judge Edgerton, dissenting, in the *Barsky* case. See Comment, *Legislative Inquiry into Political Activity*, 65 Yale L. J. 1159.

mittee's authorization not to include power to compel such identification. The Court stressed, in words applicable here, that the First Amendment required "accommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment . . ." (p. 44).

Although the *Rumely* case thus makes clear that congressionally-compelled testimonial disclosures are subject to First Amendment prohibitions, this Court has not yet elaborated guiding criteria for the "accommodation of these contending principles"—the principles of the First Amendment and of the congressional power to require information as a basis of legislation.[88] Although not directly applicable in the present context, the "clear and present danger" test and a more recent formula approved by this Court (see *Dennis* v. *United States*, 341 U.S. 494, 510), may afford some guides and analogues outside the area for which they were devised. In measuring the constitutionality of congressional interrogation, they at least serve as a reminder of the preferred position of First Amendment rights.

Whatever formula may ultimately be devised for accommodating the power of congressional inquiry with First Amendment principles, there will always have to be a weigh-

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[88] The conflict in policies here is not, as it is sometimes denominated, merely a conflict between Congressional rights and "private rights." Congressionally-enforced disclosures may discourage that free political activity and association which safeguards the democratic system itself. Beyond the protection of "private rights", this Court has always been sensitive to the vital public interests secured by the free exercise of First Amendment freedoms. It has protected those interests even where the party asserting them could show little or no injury to his own constitutional rights. See, e.g., *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Thornhill* v. *Alabama*, 310 U.S. 88; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507.

ing of the respective interests in the particular case.[89] Thus, while future close cases may require this Court to establish more particular criteria for the weighing of these interests, no such precise criteria are necessary here, for petitioner's First Amendment claims must be honored under any fair balance of the respective principles involved in the instant case. The interests involved must be judicially weighed and the substantiality of the need for the disclosure established. *It is just this balancing of conflicting principles that the court below refused to undertake.*

We turn now to a consideration of these conflicting interests and submit to the Court that on this record there was no showing of legislative need for the information petitioner refused to give the Committee, whereas, on the other hand, requiring petitioner to identify his former associates as past members of the Communist Party constituted a far-reaching infringement upon vital First Amendment rights.

B. *The Infringement on First Amendment Rights*

Petitioner and the persons whom he was required to identify as former Communist Party members enjoy the constitutional right to engage in political activities and undertake political affiliations, free from unwarranted enforced public revelation. Apart from any more general right of privacy which this Court has indicated may enjoy constitutional protection,[90] it is clear that the First

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[89] This, of course, is the import of the *Rumely* decision and the reference therein to Mr. Justice Holmes' statement in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355. *Cf. Communications Assn.* v. *Douds*, 339 U.S. 382, 400.

[90] *Quinn* v. *United States*, 349 U.S. 155, 161; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190; *McGrain* v. *Daugherty*, 273 U.S. 135, 173-174; *United States* v. *Sinclair*, 279 U.S. 263, 292-94, and cases cited; *Jones* v. *Securities Commission*, 298 U.S. 1, 25-28. See dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Amendment affirmatively guarantees some degree of privacy of individual political activity and affiliation. See *United States* v. *Rumely*, 345 U.S. 41; *United States* v. *Harriss*, 347 U.S. 612. The secrecy of the individual's ballot and the privacy of his political beliefs are not merely personal privileges—they are indispensable political necessities. In this vein, it has been well said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word or act their faith therein.*" *Board of Education* v. *Barnette*, 319 U.S. 624, 642. (Emphasis supplied.)

Requiring petitioner to disclose the past political affiliations of his associates abridges his right of political privacy as well as theirs. Compelled public disclosure of past political associations invades the privacy under which such associations were undertaken. It is, in effect, a penalty on political association which serves as a restraint on political activity. The right of political association, if it is to be meaningful, must include the right not to be subjected to public humiliation for such association.

Most serious is the *prior* restraint implicit in such compelled public disclosure. The First Amendment infringement cannot be evaluated without considering the effect of the Committee's questions as a tangible and far-reaching prior restraint upon the freedom of political association and activity of petitioner, of the persons whom he was required to identify, and of the American public itself. Indeed, there has been a noticeable dampening of voluntary group association and discussion on political matters in this country since the Committee has asserted broad and virtually unlimited inquisitorial powers in this field.

The First Amendment allows of no distinction between compelled disclosure of one's own political activities and those of one's friends and associates. To some the fear of being identified may be paramount, while others would be equally restrained by the prospect of being compelled to inform in public on their political associates. Indeed, compelled identification of the political affiliations of others may more severely abridge First Amendment rights than compulsion to identify one's own political acts and associations. "Informing" on friends and associates is for some persons, such as petitioner, far more onerous than being called to explain one's personal political activities. In the circles in which petitioner moves, his commendable refusal to take refuge for his own activities in the protection of the Fifth Amendment and thus avoid the identification of others, would be but slight mitigation had he put himself in the position of informing on former associates in the labor movement. Likewise, a person undeterred by the threat of subsequent governmental interrogation, wherein he may admit or deny, explain or justify his conduct, may indeed hesitate at the prospect of subsequent identification by third parties unwilling or unable to reveal anything but the single fact of some political association. Because of the inapplicability in congressional hearings of the hearsay rule, the rule against opinion evidence and even the basic right to present a defense, "identification" by third parties may deter many from political activities they would undertake without hesitation if they merely faced the possibility of being called to explain their own conduct.

The presently pertinent restraint on free association is thus derived both from the Committee's exercise of the power to obtain the identification of former members of a political party and its power to make petitioner an "informer" on the political affiliations of his former associ-

ates.[91] The potential restraint is all persuasive. As Mr. Justice Douglas and Mr. Justice Black warned in the *Rumely* case, "if the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom . . ." So, too, if a union man from Rock Island can be subpoenaed in 1954 to disclose the 1944 political memberships of his then associates, fear will take the place of freedom of political expression and association. Indeed, the House Un-American Activities Committee's use of the subpoena power for identification purposes has already significantly impaired those freedoms. ". . . there exists today a very general reluctance to join organizations or, indeed, to have anything to do with either persons or organizations within a very broad zone of controversiality . . . The House committee must assume part of the responsibility for this changing attitude toward organizations."[92]

It is this censoring effect, the discouragement of free

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[91] In opposing the grant of certiorari, the Government argued that petitioner has waived the protections of the First Amendment. *Brief in Opposition*, p. 22. Initially, it may be questioned how far the doctrine of waiver, applicable in cases of "personal" constitutional rights (see, e.g., *Rogers* v. *United States*, 340 U.S. 367), applies to the public guarantees of the First Amendment. In any case, the Court will find no waiver in the record.

On the contrary, petitioner specifically asserted his right to refuse to answer questions about the former political affiliation of his associates and friends. Having explicitly refused to become an informer on the political affiliations of his associates, he waived neither his own First Amendment rights nor those of others which he could legitimately assert. See *Barrows* v. *Jackson*, 346 U.S. 249. Under these circumstances petitioner's offer to tell all about himself as long as he did not have to inform on others cannot be construed as a waiver. Such a doctrine would tend to prevent the cooperation of witnesses such as petitioner, who sought as far as possible to provide the Committee with information, short of the betrayal of past political associations. Petitioner did not surrender his right to object to all questions abridging First Amendment rights merely because he consented to answer some.

[92] Carr, *op. cit. supra*, p. 357.

political activity, inherent in the Committee's assertion and exercise of a power to compel identification of members of organizations the Committee finds suspect, which has resulted in impairment of political freedoms in the United States. The power which the Committee has always asserted, as it asserts it here, to require wholesale identification and re-identification of the membership of political groups, no matter how negligible or non-existent be the legislative informational need, is the Committee's chief means of prior restraint.[93] The resulting fear of inquisition, discouraging free political expression and affiliation, is today a tragic reality of American political life.

Moreover, the restraint on the exercise of First Amendment rights arising from the Committee's use of the power of "membership identification" is compounded by the circumstances, the manner and the consequences of identification before the Committee. It is these realities of the Committee's operations that today cause many to hesitate before undertaking political activities and associations.

Collective Guilt: What organizational affiliation will result in "identification" cannot be foreseen. No organization is immune from the Committee's censure.[94] Before

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[93] One commentator has suggested that "the House should force the Committee to cease altogether its efforts to demonstrate the 'guilt' of particular individuals. The depersonalization of the work of the Un-American Activities Committee is the single most important change that is necessary if the threat offered by the committee to the American way of life is to be overcome." Carr, *op. cit. supra*, p. 462.

[94] The American Civil Liberties Union, for instance, was subjected to gratuitous attack in a Committee report on an unrelated organization for having "gone so far in its preoccupation with civil liberties as to defend both Communists and Fascists, sometimes with an almost complete disregard for considerations of national security involved." Report on Civil Rights Congress, H. Rep. No. 1115, 80th Cong., 1st Sess. (1947), p. 9. Among recent identifications required by the Committee was its demand for a list of all persons employed by or receiving any money from the

the Committee's undiscriminating standards[95] even anti-communist organizations become "subversive".[96] The Committee judges organizations by entirely accidental or incidental connections.[97] Even an organization's espousal of "democracy" as distinguished from a "republican form of government" has evoked a Committee demand for identification of members.[98]

Guilt by Association: Guilt by *past* association and by *mere* association is the basis of the Committee's identification method. In addition to the impossibility of predicting what organization will fall within the Committee's unique standards of guilt, it is impossible for the individual today to anticipate the political facts or organizational connections which, with the benefit of hindsight, the Committee may find damning tomorrow. Indeed, petitioner and those

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Fund for the Republic. As long ago as 1947 the Committee had investigated:

> "the American Civil Liberties Union, the C.I.O., the National Catholic Welfare Conference, the Farmer-Labor party, the Federal Theatre Project, consumers' organizations, various publications from the magazine 'Time' to the 'Daily Worker'." *United States* v. *Josephson*, 165 F. 2d 82, 95 (C.A. 2, 1947), *cert. den.* 333 U.S. 838.

[95] See illustrations in Judge Edgerton's dissenting opinion, *Barsky* v. *United States*, 167 F. 2d 241, 257, *cert. den.* 334 U.S. 843.

[96] On July 10th, 1956, in the Committee's hearings on a Fund for the Republic study *(Report on Blacklisting)*, Mr. John Cogley, its principal author, after having been questioned at length on the organizational affiliations of his staff members, said (Tr. pp. 115-116):

> ". . . Mr. Harrington, you referred to as a Socialist. I don't think you can refer to it as a Communist front because the group that you refer to is vigorously anti-Communist.
>
> Mr. Arens: You of course are aware of the fact that Lenin, the key philosopher of communism, has said socialism is only one transition toward communism.
>
> Mr. Cogley: Yes, sir.
>
> Mr. Arens: And Socialists are only people who are conducting the transition from democracy to communism."

[97] See Carr, *op. cit. supra*, pp. 337-363.

[98] See the letter from the Chief Counsel of the Committee reproduced at 92 Cong. Rec. A508 (1946).

he was required to identify may well have been unable to foresee in the period from 1942 to 1947, the years about which the Committee was inquiring, the advent of the cold war or the subversive purposes of the Communist Party which became clearly manifest in later years.

An individual's espousal of a cause or membership in a group, no matter how meritorious, can be occasion for "identification" if the group includes, or the cause is also espoused by, Communists.[99] The individual's association with the offending organization may be two or three times removed but the Committee still finds the association tainted.[100] Under these circumstances the unpredictability of the acts and associations which may in future years cause one to be identified or to become an identifier before the Committee, cannot but effect a severe restraint upon political activities and associations.

Interrogation: The Committee may give "identified" persons an "opportunity" to testify. But the opportunity is often unwelcome. The hearing will be designed for maximum publicity, not judicious fact-finding. Identifications may be "leaked" piecemeal in distorted form to an eager press. The rights of witnesses before the Committee to make statements of their own,[101] to present their "defense evi-

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[99] See, e.g., Carr, *op. cit. supra*, p. 341. The same inference is drawn from public opposition to the Committee itself. *Ibid.*

[100] ". . . its method has been to take the names of persons active in a non-Communist organization, which may be called A, to show that they have also been identified with organization B which is alleged to be Communist-controlled, and to conclude that they have necessarily acquired a Communist taint from B, that they have necessarily transmitted this taint to A, and that the taint has ultimately touched all members of A, even those who have had no association with B. These latter members of A are then ready to be used in new box scores to show that organization C with which they are identified has acquired the taint." Carr, *op. cit. supra*, p. 344.

[101] See Carr, *op. cit. supra*, p. 306-312.

dence"[102] and to have effective assistance of counsel[103] are severely curtailed. As a former Chairman of this Committee told a witness: "The rights you have are the rights given you by this committee."[104] The process has all the appearance of a trial without the procedural safeguards provided by our system of criminal justice.[105] An appearance before the Committee is indeed not for the timid or faint of heart.

Consequences of Identification: Added to these discouraging realities of "identification" before the Committee are the consequences which regularly follow. Identifications are endlessly re-publicized by the Committee itself, in millions of distributed copies of reports which generally include merely the damning fact of identification (see pp. 52-54, *supra*). As we have already seen, identification before the Committee is often the end of a career or profession, if not of any employment whatever,[106] for the Committee encourages the social and economic ostracism of those identified (see pp. 55-57, *supra*).

Thus, the intimidating consequences of identification before the Committee are neither incidental nor hypothet-

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[102] See Carr, *The Un-American Activities Committee*, 18 University of Chicago L. R. 598.

[103] See Carr, *op. cit. supra*, pp. 295-306.

[104] In a verbal exchange with an attorney, who had been ordered in the middle of the questioning of his client to take the oath and to testify but who had refused to do so without benefit of counsel, Chairman Thomas said:

> "The rights you have are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee. I insist you be sworn at the present time." Hearings regarding Communist Espionage in the United States Government (1948), p. 1310.

[105] Professor Wigmore has emphasized the need for limiting the legislative power of inquiry in view of the non-applicability of "evidential rules that in judicial trials protect parties and witnesses and check abuses of the power." VIII Wigmore, *Evidence* (3rd Ed.) § 2195, p. 80.

[106] See Cogley, *Report on Blacklisting* (1956).

ical. In the light of the Committee's self-confessed intention to expose, punish and even censor, the possibility of identification becomes a probability for those whose associations arouse the Committee's suspicion or the political hostility of some of its members. One who writes books, movies or television scripts, for instance, is not merely faced with the possibility of a legislative inquiry incidentally touching on his personal affairs; he can anticipate intentional identification by the Committee.[107] And even preparing and publishing a study on the effects of the Committee's activities in this area is enough to bring the author before the Committee for hostile interrogation.[108]

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[107] For instance, the 1951 Annual Report of the Committee states:

> "It was the hope of this committee, after having conducted the 1947 hearings, that the motion-picture industry would accept the initiative and take positive and determined steps to check communism within the industry . . . The committee pursued its established policy that whenever it is obvious that a responsible group, whether in industry, labor, or independent organization, does not perform its duty in guarding itself against Communist influence, then the committee must expose this defect. So it was with the motion-picture industry . . . If Communism in Hollywood is now mythical, it is only because this committee conducted three investigations to bring it about. The industry itself certainly did not accomplish this." H. Rep. No. 2431, 82nd Cong., 2d Sess., pp. 2, 8.

[108] On July 10, 1956, the Committee undertook a lengthy interrogation of Mr. John Cogley, as to his *Report on Blacklisting*. The Committee eschewed any implication that Mr. Cogley himself was not a loyal American but proceeded to question Mr. Cogley's study. The interrogation took the form principally of asking Mr. Cogley why he had not put this or that reference to this or that fact into his book. Mr. Cogley was asked questions about his assistants, such as whether he knew that Dr. Jahoda "had issued reports or studies herself critical of the loyalty programs of this Government" or knew "about her connection with the Socialist Democratic Party in Austria." (Tr. pp. 13-14).

At the conclusion of the hearing Mr. Cogley said (Tr. p. 112):

> "I would like to know, if I may, why I was called.
>
> The Chairman: Because we have been very much interested in this particular question and when your report was filed we were disappointed, at least I was, that you didn't discuss the failure of people who cooperated with congressional committees to obtain employment."

Thus, considered as a prior restraint on political freedoms, the Committee's use of the power of wholesale membership identification cannot be divorced from the realities of its self-asserted function of deliberate exposure. The restraint on political freedoms is immeasurably multiplied by the fact that it is purposeful.[109] This is the very basis of the distinction in the *Douds* case, 339 U. S. 382, 402-404, where this Court upheld the non-Communist oath provisions of the Taft-Hartley Act, stating:

> "But we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which [may] . . . be made the instrument of arbitrary suppression of free expression of views . . . Congress did not restrict the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs."

In contrast, in the instant case the Committee's identification is "frankly aimed at the suppression of dangerous ideas"; has been "made the instrument of arbitrary suppression of free expression of views"; does restrict mere political activity and is in fact an "attempt to stifle beliefs". The present abridgment is a deliberate discouragement of the exercise of political rights.

But whether purposeful or incidental, it cannot be doubted that the Committee's exercise of its power of identification has seriously endangered and restrained fundamental political freedoms. These restraints on expression and asso-

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[109] The distinction between purposeful and merely incidental abridgment of First Amendment rights has been recognized by this Court since its decision in *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, where the Court viewed the tax in question as "a deliberate and calculated device in the guise of a tax to limit the circulation of information." See also, *Niemotko* v. *Maryland*, 340 U.S. 268; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505.

ciation were imposed upon petitioner, the persons on whom he was required to "inform", and the public at large, by the Committee's requirement that petitioner identify former associates as past members of the Communist Party. It is unnecessary to speculate on just what pervasive congressional need for information could justify these infringements on political liberties; certainly no such congressional need is presented here.

C. The Committee's "Need" for the Information Sought

Having shown how grave and far-reaching is the infringement of First Amendment freedoms in this case, we turn now to an examination of the Congressional "need" asserted as its justification. In so doing we note that this Court has required the need which justifies abridgment of First Amendment rights to be not merely some need but a substantial need;[110] has accorded First Amendment rights a preferred position;[111] and has determined that congressional authority, especially where it impinges upon constitutional liberties, must be exercised with "the least possible power adequate to the end proposed."[112]

Of course, these principles do not preclude legitimate congressional inquiry. Indeed we do not doubt that legislative

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[110] Among the purposes this Court has found too insubstantial are ones such as prevention of street littering (*Schneider* v. *State*, 308 U.S. 147), prevention of fraud and crime by door-to-door peddlers (*Cantwell* v. *Connecticut*, 310 U.S. 296), protecting a householder's quiet and privacy (*Martin* v. *Struthers*, 319 U.S. 141), governmental loyalty (*Board of Education* v. *Barnette*, 319 U.S. 624) and private property rights (*Marsh* v. *Alabama*, 326 U.S. 501).

[111] See *Saia* v. *New York*, 334 U.S. 558, 561, and cases cited.

[112] *Marshall* v. *Gordon*, 243 U.S. 521, 541, quoting from *Anderson* v. *Dunn*, 6 Wheat. 204, 231. This Court has repeatedly struck down legislation abridging First Amendment rights where the governmental objective asserted could be accomplished by a narrower restriction. See, e.g., *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-506; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Schneider* v. *State*, 308 U.S. 147; Comment, *Legislative Inquiry into Political Activity*, 65 Yale L. J. 1159, 1173 n. 78.

requirements for information may support congressional inquiry into membership in the Communist Party under certain circumstances; the world-wide and domestic Communist menace is certainly an appropriate subject of congressional concern. But a legislative need for membership information in a particular situation at a particular time may be conceded without affirming the necessity of membership identification in all situations and at all times.

What the Committee demanded from petitioner in 1954 was identification of former associates as members of the Communist Party between 1942 and 1947. At the time of the hearings in question, the program and activities, and the character and membership of the Communist Party during these years had been exhaustively examined by the Committee itself.[113] In 1954 these matters were no longer subject to any appreciable amplification by the mere further accumulation of the names of Party members before 1947. The Committee's files at the time of these hearings already included the names of thousands of Party members[114] and millions of individuals on whom the Committee had information.[115]

The questions asked petitioner related to membership in the Communist Party many years before the hearing. In the interim, in 1947, Congress had enacted special legislation to deal with Communists in the labor movement. The need for information in 1954, if any there was, would have been in connection with the efficacy of that legislation between 1947 and 1954, rather than the names of Communist Party members between 1942 and 1947. Membership in the

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[113] See Ogden, *The Dies Committee* (1945); Carr, *The House Committee on Un-American Activities, 1945-1950* (1952).

[114] See pp. 50-51, *supra*.

[115] As early as 1943 the Committee reported having a file of "over 1,000,000 cards, each containing information on individuals and organizations engaged in subversive activities." H. Rep. No. 2748, 77th Cong., 2d Sess., p. 2.

Communist Party in these years would in itself have little enlightening significance; the Communist Party before the beginning of the "cold-war" in 1947 had a vastly different appearance than thereafter.

In his dissenting opinion, Judge Edgerton described some of these significant differences, such as this country's relationship with the Soviet Union and its attitude towards communism during the years in question (R. 191-192). Numerous persons, many doubtless idealistic and high-minded in their purpose, joined the Communist Party during this period, became disillusioned and left. It has been estimated that, although the average yearly Communist Party membership was about 40,000, over 700,000 persons have, at one time or another, been members thereof. Ernst and Loth, *Report on the American Communist* (1952) pp. 14, 33. One former member has referred to "those thousands who continually drift into the Communist Party and out again" and pointed to the fact that "the turnover is vast." Chambers, *Witness* (1952) p. 12. John Lautner, formerly a member of the Communist Party, testified in the trial of *United States* v. *Fujimoto*, 102 F. Supp. 890 (D. C. Hawaii, 1952) concerning the disillusionment of members with the Communist Party, as follows:

> "The Party was like a barn door, they were coming in and going out. As soon as new members found what the Party was they left. Year in and year out there was almost a hundred—well, a large percentage of turnover in the Party."

We are a nation of "joiners." Membership is not necessarily indicative of concurrence with the collective purpose, whether that purpose be overt or covert. A chance invitation from a friend or acquaintance at some party or meet-

ing will often result in a donation which turns out years later to have been a membership fee. As this Court recently emphasized in *Wieman v. Updegraff*, 344 U.S. 183, 190-191:

> "... membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged '. . . one of the great weaknesses of all Americans, whether adult or youth, is to join something.' At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends."
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> "... yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources."

The Committee required nothing from petitioner other than the names of former Party members. It is difficult to see how such names acquired any informational significance except on the presumption that every former member of the Party necessarily shared in the purposes and activities which have become clear only in later years. In effect, the ordinary legislative inquiry has been reversed—instead of accumulating information on individual activities which reveal collective purposes or methods, a conclusion of collective guilt is employed to justify revealing the mere names of any former members. A valid Congressional

clear that it had no interest in determining the total number of Communists in his union or the identity of any except the specified ones they sought to expose.

Finally, it must be noted that this new theory of determining extent *name by name*, proposed by the Government, would permit a Committee, every time it sought to determine whether there was a problem in a particular area of American life, to identify publicly every person possibly in the category under scrutiny. Even though the dimensions of the problem were well known, as was the case here, the Government contends for the right of a congressional committee to determine the mathematically-exact extent of the problem by identifying each and every person in the suspect category no matter how far back. In the absence of any possibility or asserted possibility of legislative need for such a retroactive census, one can only find in the Government's theory a transparent rationalization of congressional investigation conducted for the sole purpose of exposure.

Just as the Government's new theory of the Committee's purpose in interrogating petitioner amounts to little more than a rationalization of exposure, so its legal conclusions amount to little more than a request for judicial abdication in the area of congressional investigations. In determining committee purpose, the Government asks the Court to close its eyes to any but the vague declarations of the authorizing resolution and the record of the Committee hearing at which petitioner testified and to give a hospitable interpretation (namely, its own tardy interpretation) to that resolution and record consistent with the respect and deference owed a coordinate branch of the Government. In considering the protections of the First Amendment, the Government, apparently rearguing *United States* v. *Rumely*, 345 U.S. 41, contends that the First Amendment is inapplicable to Congressional investigations

(Gov't. Br. 67-68) and, at the very minimum, that there is no First Amendment protection where the questions relate to any aspect of the Communist Party or Communist activities (Gov't. Br. 63-64). Finally, the Government denies that the standards of definiteness applicable to criminal statutes are applicable to contempts of congressional investigatory authority (Gov't. Br. 71). No matter how clear the Committee purpose of exposure, no matter how deep the Committee inroads on the First Amendment, and no matter how vague the authorizing resolution, this Court is asked to place the rubber-stamp of "contempt" upon any defendant who rejects the cloak of the Fifth Amendment.[4] Whatever may be the situation where Congress seeks to enforce its own contempt citations at the bar of either House, this Court cannot, consistent with the presumption of innocence (*Sinclair* v. *United States*, 279 U.S. 263, 296) and its decisions, from *Kilbourn* to *Quinn*, sustain a judicially-imposed conviction of the defendant without subjecting the congressional action to judicial scrutiny. Courts will not lend their aid to the arbitrary exercise of power.

One other general theme appears to run through the Government's brief—i.e., that there is some sort of analogy between the obligations of a witness at a judicial trial and those of a witness at a congressional hearing (Br. 19, 33, 41, 66, 73, n. 37). But this analogy breaks down right at the

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[4] Assistant United States Attorney Hitz, who tries the contempt cases for the Government in District Court, is more direct in his presentation of the Government's theory of "Fifth Amendment or nothing." Arguing in the District Court for petitioner's conviction, Mr. Hitz stated:

> "There is no protection for one who is in a position to give information to the Government and who has any reason other than the Fifth Amendment not to give it that will stand up against a charge under this indictment." (Transcript, p. 244).

Apparently, too, the Court of Appeals has now reached the ultimate extension of the *Barsky* case and accepted this same theory. *Barenblatt* v. *United States*, decided January 3, 1957, petition for certiorari pending, No. 742, October Term, 1956.

outset because the very breadth of the scope of congressional investigation for which the Government contends permits no meaningful comparison between judicial and congressional investigation.[5] Whereas testimony at a judicial proceeding centers around particularized and timely issues of fact, questioning at congressional hearings subjects the witness to uncircumscribed, and, in the view of the Government, unlimited areas of inquiry as to both subject and time.[6] Furthermore, testimony at a judicial trial is taken before an impartial judge and jury, whereas in congressional hearings the functions of judge and jury, and investigator and prosecutor, too, all reside in the committee members.[7] Finally, questions in a judicial trial are far less likely to impinge on matters of personal belief and conscience than are questions put by congressional investiga-

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[5] The Government not only argues that congressional committees must be able to inform themselves very broadly (Br. 29-30), but goes farther and contends (see Point V, *infra*) that the authority of the committees must be stated in such broad terms that the rules of definiteness applicable to criminal statutes cannot be applied in this area. Indeed, says the Government, the authorizing resolutions of congressional committees "are broader than the broadest acceptable standards which Congress may lay down in delegating authority to executive departments and agencies" (Br. 71). They are, we submit, many times broader than the issues in a courtroom.

[6] A persuasive illustration of the peril at which a congressional witness determines the nature of the inquiry and his rights therein appears in the instant case, where the Government's principal argument as to the nature and purpose of petitioner's interrogation was furnished him not at his hearing or in the lower courts but rather for the first time in an answering brief in the United States Supreme Court.

[7] There appears to be some disagreement between various committees of the American Bar Association on the dangers inherent in combining these functions. The Special Committee on Communist Tactics, Strategy and Objectives, in its brief amicus in this Court, apparently could find no danger in combining these functions in a legislative committee. A separate committee, proposing a statute to strip such federal agencies as the Federal Trade Commission of quasi-judicial authority, takes the view that "the adjudicating authority vested in many of the Federal agencies makes them policemen, jury and judge. . . . It just doesn't work." See New York Times, February 16, 1957, p. 33, col. 1.

tors delving into un-Americanism and subversion. Our judicial system is too jealous of the rights of witnesses called before the courts to permit of any fair analogy to witnesses called before congressional committees and subjected to questioning without the historic safeguards of the courtroom.

We turn now to the arguments in the Government's brief in so far as they are directed at petitioner's contentions. In so doing, we will follow the order in our initial brief.

I

The Congressional Power to Investigate Is a Limited Power and Does Not Encompass Exposure for Exposure's Sake

The Government's brief (Br. 53-57) does not take direct issue with petitioner's contention that it is beyond the constitutional power of a congressional committee to compel testimony for the sole or primary purpose of exposing individuals to public scorn and retribution. It does, however, make two tangential forays into the area which warrant a brief rejoinder.

The Government suggests that "there is considerable support amongst students of congressional power for the view that the 'informing function' of Congress is one of the inherent powers of the legislatures of representative governments" (Br. 55). But this appeal to Woodrow Wilson's phrase "informing function" is unavailing; he was writing about discussion and interrogation within the main body of Congress (see his reference to the question periods in the House of Commons) and not the use of compulsory process to compel the testimony of unwilling witnesses before congressional committees.[8] And the "informing function"

[8] See *United States* v. *Rumely*, 345 U. S. 41, 44; Barth, *Government by Investigation* (1955), p. 23.

referred to in the articles cited by the Government is an informing function in connection with the conduct of public business and the supervision of public administration." Whatever may be the allowable limits of the "informing function" in this area of supervising governmental action, none of the authorities cited by the Government remotely suggested its application to "the private affairs of the citizen" and we do not read the Government's brief as contending that they did.

The Government also appears to suggest (Br. 56-57) that, because Congress may require the publicizing of information through regulatory legislation, it may act through a committee to compel testimony to publicize information in the absence of legislation. But there is no distinction more fundamental to our tripartite system of democratic government than the distinction between a subcommittee (often a single member) of one House of Congress demanding and publicizing information and this being done pursuant to valid legislation passed by both Houses of Congress and subjected to Presidential veto and judicial review. In the first case, the congressional committee or subcommittee is seeking, not to obtain information for legislation, but to bring about the substantive results that would flow from the legislation if enacted. It is, in a word, seeking to shortcut the entire legislative process and bring about the effect of the legislation through its own action. The publicizing of information through duly-enacted legislation, general in application, prospective in effect, and definite in operation, is one thing; the publicizing of information through congressionally-compelled testimony of individual citizens, dis-

[9] Whether this is actually an "informing" rather than a "legislative" function might well be questioned. Petitioner's counsel actually included "the review of the actions of executive departments in the expenditure of public funds" as part of what it described as a legislative purpose (Pet. Br. 25).

criminatory in application, retroactive in effect and without procedural safeguards in operation, is something wholly different.

Indeed, one might venture the suggestion that it was the blurring of this very distinction that lay at the root of the post-war assaults upon the Bill of Rights. For a single Senator could utilize the subpoena powers of his congressional subcommittee for legislative trials, publicizing vague and long-forgotten derogatory information about distinguished citizens, whereas he could never have brought about the enactment of legislation to accomplish this same end. And the Committee on Un-American Activities could utilize its subpoena powers in the wholesale *ex post facto* exposure of private citizens described in petitioner's brief (pp. 41-58) whereas the Committee could never have brought about legislation to accomplish this same end. Indeed, the legislation actually enacted in this area (Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781 et seq; Foreign Agents Registration Act, 52 Stat. 631, 22 U.S.C. 611; Labor-Management Relations Act, § 9(h), 61 Stat. 143, 29 U.S.C. 159(h)), is general in application, prospective in effect and specific in operation.

We respectfully submit that the experience of the past decade has amply illustrated the significant distinction between publicizing of information pursuant to duly-enacted legislation and congressionally-compelled disclosures in the absence of legislation; it has pointed up the dangers to a free society when congressional committees go beyond investigation for the purpose of legislation and engage in exposure for exposure's sake.

II

The Questions Petitioner Refused to Answer Were Asked Solely for the Purpose of Exposing Him and Former Associates to Public Scorn and Ridicule

In both lower courts[10] and in petitioner's initial brief in this Court, petitioner marshalled his proof of exposure in chronological order (Br. 39-76). The Committee's express claims of an independent power of exposure were placed first as the *background* against which the particular evidence of exposure in petitioner's case should be considered, because, as stated by the dissenting judges below, "intentions tend to result in acts" (R. 195). Although we can conceive of no possible reason for this Court to deny itself this wealth of background material (Pet. Br. 41-58), the Committee's actions *vis-à-vis* petitioner in and of themselves leave no doubt that this was a clear case of exposure for exposure's sake.

In its brief the Government attempts to meet the force of petitioner's arguments on exposure by asking the Court to ignore all evidence of Committee purpose except the authorizing resolution and the Committee hearing at which petitioner testified, and, hospitably interpreting the resolution and the Committee hearing, to find a valid legislative purpose therein. We respectfully submit that logic and precedent militate against the Court accepting any such

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[10] The Government's implication that the trial court and the Court of Appeals found that the Committee was acting pursuant to a valid legislative purpose (Gov't. Br. 27-28) is contrary to fact. The trial court refused to consider the issue of exposure (R. 49, 58-60), apparently accepting the Assistant United States Attorney's views (see n. 4, *supra*) that there is no defense to Committee action in the general area of Communism except the plea of self-incrimination. The Court of Appeals' formal conclusion of a valid legislative purpose (R. 178-179), upon which the Government relies (Br. 28, n. 9), was clearly based on its earlier statement that it is enough that "the questions asked Watkins *could* be asked for a valid legislative purpose" (R. 178; Pet. Br. 70-76).

artificial limitation upon the scope of judicial review as that for which the Government contends, but even the limited materials which the Government concedes are proper subjects of scrutiny by this Court leave no doubt that this was a simple case of exposure. We will take up each of these points briefly, dealing first with the limited materials which the Government would have this Court examine.

1. Although the Government suggests that both the Committee's authorizing resolution and the record of the Committee hearing should be examined to determine Committee purpose (Br. 28), it places no noticeable reliance upon the former. Nor could it have done so. The vague and general terms in which the authorizing resolution is couched lend no aid in the search for Committee purpose. It is one thing to find evidence of Committee purpose in the authorizing resolution of a Committee created to investigate a particular incident (*Cf. McGrain* v. *Daugherty*, 273 U.S. 135; *Sinclair* v *United States*, 279 U.S. 263, and other cases cited by the Government at p. 28); it is a far different thing to find Committee purpose in a resolution to investigate broad areas of American life over a period of nearly 20 years. And, certainly, if the language of the resolution is to be considered in arriving at Committee purpose, its interpretation by the Committee over the years is equally to be considered, and here the Government runs squarely into the Committee's express claims of an independent power and duty of exposure (Pet. Br. 41-58).

The Government, in arguing that the Committee hearing evidenced a valid legislative purpose, relies upon a *pro forma* multi-purpose opening speech by the Committee Chairman many weeks (R. 43-44) and many unrelated and diverse witnesses (Pet. Br. 72) before petitioner testified. But this opening statement lends no comfort to the Government. For the Chairman's gentle puffing about bills recom-

mended by the Committee and enacted over the years and his catalogue of bills pending before the Committee cannot be taken as the Committee's purpose at petitioner's hearing where the questioning was totally unrelated to any of the bills enacted or pending or any other possible legislation (Pet. Br. 58-64, 70-76).[11] *Certainly past or pending legislation is not a license for a Committee to engage in exposure unrelated to that legislation.*

The Government itself appears to recognize that the questioning of petitioner had nothing whatever to do with the legislation to which the Chairman adverted. Indeed, the Government conceded, as we noted earlier, that the Committee was not concerned with "the general nature of Communist infiltrative techniques *vis-à-vis* labor unions" (Gov't. Br. 18) or "the nature of 'Communist techniques in labor unions' " (Gov't. Br. 39), and turns in this Court to its new theory that the Committee's purpose was to learn "the *extent* of the Party's penetration into these unions" (Gov't. Br. 18, 39) by determining "the numbers and identities of individuals who belong to the Party" (Gov't. Br. 34).[12] But,

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[11] The Government also relies upon the Chairman's general statement that the Committee was out to "ascertain the extent and success of subversive activities" (R. 43) and his somewhat similar statement to petitioner (R. 86). But these self-serving declarations that the Committee was following its authorizing resolution carry even less weight than the puffing about past legislation and the cataloguing of pending legislation.

[12] The Government makes two other half-hearted justifications for the Committee questioning of petitioner:

(i) The Government suggests that petitioner was questioned with a view to obtaining corroboration of the testimony of Rumsey and Spencer. But it adds nothing to the fact that petitioner was being questioned concerning whether certain persons were Communists between 1942 and 1947 to say that he was being questioned to corroborate the testimony of earlier witnesses who had testified that these persons had in fact been Communists during that period. That Rumsey and Spencer were willing tools of the Committee's purpose of exposure does not make corroborative testimony any less a part of the Committee's purpose of exposure.

(ii) The Government also suggests that "petitioner had shown himself to be a recalcitrant witness" (Gov't. Br. 40, n. 19). The degree of confidence with which the Government makes this suggestion can best be

as we have already demonstrated (pp. 2-6, *supra*), even the most credulous could hardly accept the argument that the Committee had suddenly set out to find the mathematically-exact extent of the problem with which it had been dealing for 16 years by naming and numbering every Communist in the labor movement ten years earlier or that it sought such information in connection with any past, present or future legislation. Thus, even limiting the Court's scrutiny to those very materials deemed appropriate by the Government, the absence of a legislative purpose is clear.

2. But there is no occasion for this Court to deny itself other probative materials relevant to a determination of the Committee's purpose. As the Court has clearly stated, "if they [Congress] are proceeding in a matter beyond their legitimate cognizance, *we are of opinion that this can be shown . . .*" *Kilbourn* v. *Thompson*, 103 U.S. 168, 197. And, pursuant to this Court's holding that the absence of a legislative purpose "can be shown", the Court has examined debates on the floor of Congress (*McGrain* v. *Daugherty*, 273 U.S. 135, 179, n. 20; *United States* v. *Rumely*, 345 U.S. 41, 45-47) and internal committee action (*Sinclair* v. *United States*, 279 U.S. 263, 295) to determine the purpose and scope of legislative inquiry.[13] Far from limiting the scope of its review, this Court has weighed whatever evidence of

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seen by its statement, later in its brief, that "a more complete and candid statement of his [petitioner's] past political associations and activities . . . can hardly be imagined" (Gov't. Br. 39).

[13] The Government relies on *McGrain*, *Sinclair*, *Chapman* (166 U. S. 661) and *Barry* (279 U.S. 597) to support its contention that this Court should limit its review to the authorizing resolution and the Committee hearing at which petitioner testified. But, as we have shown in the text, this Court examined other evidence in *McGrain* and *Sinclair* and simply found that the materials offered were "not enough to show" (*Sinclair* v. *United States*, 279 U. S. 263, 295) the absence of a legislative purpose. In *Chapman* there was no contention that the congressional committee was pursuing an improper purpose in its questioning and in *Barry*, the witness not yet having been interrogated, this Court would not assume, in advance of the interrogation, that the asserted objective in the authorizing resolution would not be followed.

purpose has been put before it by either party. The rule, we submit, is simply one of reason and of relevance.

On any basis of reason and relevance, this Court can weigh the Committee's express claims of the power of exposure (Pet. Br. 41-58) in determining its purpose in interrogating petitioner. What the Government refers to as "extraneous evidence" (Br. 42) is actually the type of evidence considered regularly by this Court in determining congressional intent—excerpts from official reports and hearings of the Committee (R. 62-63, 111-163), excerpts from statements on the floor of Congress by the Chairman and members of the Committee in connection with Committee business (R. 63, 164-168), and statements to the press by the Chairman and members of the Committee on Committee business (R. 64, 168-174). There is certainly no reason to ignore the Committee's own view of its responsibilities reflected in these materials. "By claiming that it had the authority and duty to expose, the Committee implied it intended to expose . . . it may be inferred from a person's statement that he intended to do something, that he later actually did it" (R. 195-196).

Nor is the Government's *in terrorem* argument against the use of relevant evidence of Committee purpose convincing. The Government conjures up hypothetical cases of conflicting testimony by Committee members to demonstrate the "practical problems" (Br. 49) that will arise if the courts may examine into more than the self-serving declarations in the authorizing resolution and the Committee hearing. We cannot believe these "practical problems" are insurmountable. Legislators will not often be called to testify as hostile witnesses to the invalidity of their own actions. Furthermore, if committee purpose is so vague that committee members cannot agree, the time will certainly have come for the courts to intervene. But, what-

ever may be the situation in such a hypothetical case, petitioner presents to this Court proof of exposure through relevant materials uniformly accepted as proof of purpose and intent.

III

The Questions Petitioner Refused to Answer Were Outside the Scope of the Committee's Authorization

As indicated in our initial brief (p. 77), counsel for petitioner would have preferred to rely entirely on the clearcut and overwhelming constitutional arguments against exposure. Now, having reviewed the tortuous course of the Government's efforts to avoid the force of petitioner's arguments, we are more than ever ready to rest our case on the simple proposition that petitioner's questioning was an indisputable case of exposure for exposure's sake. But we remain mindful of our obligation to seek a narrower ground of decision and, having argued below and in our initial brief here that the Committee's questioning of petitioner was beyond the scope of its authorizing resolution, we call the Court's attention to the fact that the Government has wholly failed to meet our contentions in this regard.

Petitioner's initial brief argues extensively (pp. 76-95) that the questions upon which petitioner's conviction is based were outside the scope of the Committee's authorizing resolution for two reasons: first, because the authority of the Committee cannot be deemed to include a mandate to engage in exposure, and, second, because, whether or not the Committee's purpose was one of exposure, the questions upon which petitioner's conviction is based are unauthorized by the language of the resolution, which is confined to propaganda and propaganda activities.

The Government answers the first of petitioner's contentions with the statement that the Committee had a valid

legislative purpose and was not engaging in exposure (Gov't. Br. 31, n. 13). The Government apparently concedes that, if the Committee was engaging in its asserted power of exposure, it was exceeding its own authorizing resolution.[14] We submit that, in interrogating petitioner, the Committee was so engaged and was so exceeding its own authorizing resolution.

The Government does not answer the second of petitioner's contentions—that, whether or not the Committee's purpose was one of exposure, the questions upon which petitioner's conviction is based are unauthorized by the language of the resolution, which is confined to propaganda and propaganda activities (Pet. Br. 17-18, 82-86). Instead, the Government's brief states that "petitioner does *not* urge that, if the Committee did have a proper legislative purpose (as we believe), its actions were unauthorized by its charter from the House" (Gov't. Br. 31, n. 13). *Lest there be any misunderstanding on this point*, we repeat that we urged below, we urged in our initial brief in this Court, and we urge here that the Committee's authorization is limited to the investigation of propaganda and propaganda activities (Pet. Br. 78, n. 61, 82-84) and that the questions upon which petitioner's conviction is based are clearly and indisputably unrelated to propaganda and propaganda activities (Pet. Br. 84-85). If the Court concludes that the authorizing resolution has not been broadened beyond propaganda and propaganda activities by ratification (Pet. Br. 86-95), petitioner's contention here appears to be the

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[14] The authorizing resolution is limited by its own terms to matters which would aid Congress in the consideration of remedial legislation and thus excludes questions asked solely for exposure purposes (Pet. Br. 79-82) and the Government appears to concede, by failing so much as to mention the point, that this has not been altered in any way by ratification through extension, reenactment or appropriation (Pet. Br. 86-95).

narrowest ground upon which a reversal of his conviction can properly be predicated.[15]

IV

The Compelled Disclosures Sought by the Committee Abridge Rights Protected by the First Amendment

The Government makes three arguments in support of its contention that the Committee did not violate petitioner's rights under the First Amendment by requiring him to identify former associates as past members of the Communist Party:

1. Petitioner was attempting to vindicate not his, but their, rights (Br. 58-60).

2. There are no First Amendment protections against congressional inquiry (Br. 66-68).

3. Since Communism is a fit subject of inquiry and legislation, Congress has the power to identify publicly

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[15] It should be noted that the Government's new theory of purpose that the Committee was seeking to determine the mathematically-exact extent of Communist penetration of labor unions by naming and numbering further demonstrates that the questions asked petitioner were beyond the Committee's authorization. For certainly a retroactive census of Communists during the years 1942-1947 can have no relation to propaganda and propaganda activities. Indeed, this newly-asserted Committee purpose is so novel a function for a congressional investigating committee and trenches so immediately upon valued constitutional rights (Point IV, *infra*) as to require a far clearer congressional authorization than any which the Government can show in the instant case.

The dangers of a broad construction of congressional investigative authority are clearly evident here. Recently it has been politically popular to hunt and expose Communists. Today it is the vogue in the south to hunt and expose NAACP members. Tomorrow it may be politically popular to hunt and expose sex deviates and even women suspected of living well without visible means of support. The public interest is not served by a latitudinarian extension of a legislative committee's authorization to investigate specified matters to the point where the committee reaches "into the private affairs of the citizen."

all past and present members of the Communist Party (Br. 23, 63-64).

None of these arguments withstands analysis.[16]

1. What petitioner was seeking to vindicate in his refusals to answer was his purely personal right not to become an informer on past political associates.[17] In a world in which informers are deemed the most hateful of men, "invented to be the public ruin" (Tacitus, *Annals*, Book 4, p. 30), compelled "informing" on past political associates is both a public humiliation for such past association and a prior restraint on petitioner's future association and activity.[18] Since petitioner was clearly attempting to vindicate his own rights, it becomes unnecessary to question the Government's assertion that petitioner could not invoke the rights of his former associates, although this Court's decision in *Barrows* v. *Jackson*, 346 U.S. 249, unmentioned by

[16] The Government refers to, but does not rely upon, the additional fact that petitioner did not use the words "the First Amendment" at the Committee hearing (Br. 13, 59, n. 30). Nor could the Government have so relied, for petitioner made clear his intent to claim whatever rights he had when he stated to the Committee that the questions he refused to answer "are outside the proper scope of your Committee's activities" (R. 85), that the Committee had no "right to undertake the public exposure of persons because of their past activities" (R. 86) and that he refused "to discuss the political activities of my past associates" (R. 86). Furthermore, petitioner has found no authority, and the Government cites none, for the proposition that a witness before a congressional committee must plead the First Amendment precisely as he would the privilege against self-incrimination. Certainly *Ullmann* v. *United States*, 350 U.S. 422, which the Government mentions in this connection, involved a failure to plead the First Amendment in the trial court, not before the Committee.

[17] That these associations were no less political because they were with the Communist Party is developed at page 96, note 81, of petitioner's initial brief.

[18] The fact that petitioner yielded to Committee and public pressure to the extent of naming four persons whom he had reason to believe might still be Communists in no way weakens his position in refusing to become an informer against those who "have long since removed themselves from the Communist movement" (R. 85) and who would have suffered bad trouble from his act of informing.

the Government, would appear to indicate that petitioner could legitimately have asserted the rights of these former associates.

2. Arguing that there is no "right to silence" or "right of privacy" protected by the First Amendment, the Government continues to assert that the First Amendment "was designed to prevent attempts by law to curtail freedom of speech" and is not concerned with "compelled testimony of witnesses before a congressional committee" (Br. 66-68). We have no occasion to debate with the Government whether an abstract "right to silence" or "right of privacy" actually exists (Pet. Br. 100, n. 90), because this Court's decision in the *Rumely* case and this Court's dictum in the *Quinn* case[19] leave no doubt that First Amendment protections do apply to testimonial disclosures of political activity compelled by congressional committees. It is too late in our constitutional development to argue that speech and association are less protected from repressive congressional inquiry than from repressive congressional legislation. What is open, and all that is open, is the formula for accommodating the principles of the First Amendment and congressional power to require information as a basis of legislation and the application of such a formula to the facts at bar. We turn now to this question.

3. As we point out in our initial brief (Pet. Br. 99-100), whatever formula may ultimately be devised for accommodating the power of congressional inquiry with First Amendment principles, there will always have to be a weighing of the repressive effect of the inquiry upon First Amendment rights against the Committee's need for the information sought. But the Government, like the court be-

[19] "Still futher limitations on the power to investigate are found in the specific *individual guarantees of the Bill of Rights*, such as the Fifth Amendment's privilege against self-incrimination which is in issue here." *Quinn* v. *United States*, 349 U.S. 155, 161. (Emphasis supplied.)

low, refuses to make any such weighing of the conflicting interests.' Nowhere does the Government challenge petitioner's demonstration that the Committee's exercise of its power of exposure has seriously endangered and restrained fundamental political freedoms (Pet. Br. 100-110); nowhere does the Government answer petitioner's demonstration of absence of legislative need (Pet. Br. 110-115) except to repeat its assertions that the Committee was engaged in determining the *extent* of past Communist infiltrations into the labor movement. Instead of seeking to assist this Court in making the "accommodation of these contending principles", the Government argues that, since Communism is a fit subject of inquiry and legislation, Congress has the power to name one by one all former members of the Communist Party (Br. 23, 63). But one can no more argue that the legitimate congressional interest in the area of Communism validates all congressional investigative action in this area than one could argue that this legitimate congressional interest would validate all congressional legislative action in this field. A legitimate congressional interest in any field, including Communism, is not a license to compel testimony from anyone who happened to enter that field at any time in the past. The legislative need for the testimony must still be weighed against the repressive effect of the compelled disclosure. The Government makes no attempt to demonstrate that the balance of interests lies with the compelled disclosure sought by the Committee.

V

2 U.S.C. 192, Read Together With the Authorization of the Committee on Un-American Activities, Is So Vague and Indefinite as to Deprive Petitioner of Due Process of Law

In an effort to save the Committee's authorizing resolution from its admittedly vague and indefinite language, the

Government argues that the standards of definiteness applicable to criminal statutes are inapplicable to resolutions creating congressional committees (Br. 71). The Government does not explain just how the due process requirement that criminal statutes provide a reasonably ascertainable standard of guilt[20] is rendered inapplicable to contempt prosecutions, nor does the Government set forth any precedent supporting a special reprieve from the due process clause for criminal statutes predicated on congressional authorizing resolutions. Rather the Government relies upon the broad terms in which the jurisdiction of congressional committees are generally couched and concludes that to "judge congressional resolutions defining powers of committees by the normal standards of definiteness applicable to criminal statutes would invalidate every general assignment of committee jurisdiction and hopelessly hobble the vital work which Congress accomplishes through its committees" (Br. 72).

This calamity appeal is without substance. The general assignment dividing committee jurisdiction of legislative business within the Congress is one thing; its application to a defendant indicted for refusing to answer certain questions when subpoenaed to appear before a committee is something far different. Actually, only three committees of the House, one of them the Committee on Un-American Activities, have standing subpoena power,[21] and only the Committee on Un-American Activities makes regular use of compelled testimony; the others function regularly by staff research and voluntary testimony. It would thus hardly "hobble the vital work which Congress accomplishes through its committees" to require that the authority of

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[20] *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Connally* v. *General Const. Co.*, 269 U.S. 385; *Herndon* v. *Lowry*, 301 U.S. 242.

[21] Riddick, *The United States Congress: Organization and Procedure* (1949), p. 196.

committees proceeding by subpoena be sufficiently clear so that a witness can reasonably ascertain whether the questions he is being forced to answer come within the committee's authorizing resolution. Indeed, one might venture the thought that if each new Congress or session of Congress had been required to define with specificity the areas into which it desired the Committee on Un-American Activities to delve, the wholesale process of unlawful exposure described in petitioner's brief (pp. 41-58) might never have been permitted to threaten free political association and activity.

What the Government is overlooking here is the distinction properly to be drawn between an exercise of the legislature's own contempt power and a criminal prosecution for failure to answer questions.[22] Where the legislature's own contempt power is utilized, the witness is haled before the bar of the House and ordered to respond to specific questions; he has a last clear chance to answer and avoid punishment after the House has itself clarified the issues. But in a criminal prosecution for failure to answer, where he has no such last clear chance, the clarity of the authorizing resolution is a matter of vital importance. If Congress chooses to inflict punishment by criminal prosecution for refusal to answer committee questions, then it should be held to accepted constitutional standards of precision in its authorizing resolutions, so that witnesses are not obliged to make uninformed guesses in deciding whether questions put to them are within the authority of the committee. Congress cannot utilize a criminal statute to enforce its will and yet deny the defendant the right to a reasonably ascertainable standard of guilt.

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[22] See *Brief for Robert M. Metcalf, Amicus Curiae*, pp. 35-37. We summarize that discussion in the text.

VI

Petitioner Has Been Deprived of His Right to a Fair and Impartial Grand Jury

A similar question concerning the grand jury was raised earlier at this Term of Court in *Ben Gold* v. *United States*, No. 137. There, as in three other recent cases,[23] this Court reversed convictions without reaching the grand jury point. As in those cases, the Court here will no doubt desire to consider first whether petitioner was properly convicted for his refusal to "inform" on past associates and will only reach this grand jury point if it should reject all of petitioner's previous arguments (Points I-V).

The Government contends (Gov't. Br. 74-76, Gov't. Br. in *Ben Gold* case 123-138) for a "strict" grand jury rule, predicated on the rationale that "an indictment is, after all, no more than an accusation",[24] that would validate all grand jury action so long as the grand jurors were representative of the community and no large segments of the population were deliberately excluded. But what this "strict" rule overlooks is that a defendant is entitled to a "*responsible*",[25] as well as a "representative", tribunal, before he may be put to trial. What petitioner's unanswered affidavit (R. 5-10) presents is the case of a grand jury rendered irresponsible by bias and prejudice against the defendant, and the wrong done petitioner and the processes of justice by an irresponsible tribunal is far more serious than that done by the unrepresentative nature of the grand jury in the exclusion cases.

We respectfully submit that the Government's proposed

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[23] *Quinn* v. *United States*, 349 U.S. 155, 170; *Emspak* v. *United States*, 349 U.S. 190, 202; *Bart* v. *United States*, 349 U.S. 219, 223.

[24] *United States* v. *Remington*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.

[25] *Beavers* v. *Henkel*, 194 U.S. 73, 84.

"strict" rule would be more damaging to our legal processes than would the abrogation of the requirement for grand jury indictment (in the Constitution for capital and infamous offenses and in various statutes for misdemeanors, including that involved in contempt, 2 U.S.C. § 194). For, like wholesale evasion of law, irresponsibility in the operation of established legal procedures can only result in public contempt for the "democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195. An irresponsible grand jury is worse than none.

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Since 1949 the Department of Justice has regularly published up-to-date figures on the precise membership of the Communist Party. These figures from 1949 through 1956 are: 54,174; 52,669; 51,785; 43,217; 37,000; 31,608; 24,647; 24,796; 22,663; 20,289.

"According to our best information, there is a total of 54,174 members of the Communist Party in the United States at the present time. I have here and would like to submit to the committee a chart showing the distribution of the membership in the Communist Party by districts and by states . . .

"For example, New York State has 25,000 members; California, 6,977; Illinois 3,361; Pennsylvania, 2,876; Ohio, 2,834; Michigan, 1,250; Massachusetts, 1,022; Nevada, 23; Wyoming, 10; Tennessee, 27; Alabama, 141; New Hampshire, 43; and so on."

(J. Edgar Hoover, testifying before a Senate appropriations subcommittee, February 3, 1950, "Department of State, Justice, Commerce and the Judiciary Appropriations for 1951," p. 143.)

"Faced by new restrictive laws, the Communist Party continued to go further underground during the fiscal year ending June 30, 1951, J. Edgar Hoover, Director of the Federal Bureau of Investigation said today. Estimated party membership dropped from 51,785 in the previous fiscal year to 37,000 in the period for which he reported."

(New York Times, June 25, 1952, p. 15, col. 4.)

"The membership figure as of December 31 is 43,217."

(J. Edgar Hoover, testifying before a House appropriations subcommittee, February 15, 1951, "Department of

State, Justice, Commerce and the Judiciary Appropriations for 1952," p. 336.)

"When I appeared before the committee several years ago I reported that the membership of the party in 1949 totaled 54,174. In 1950, when I appeared before the committee, it totaled 52,669. In 1951 it totaled 43,217. Today its membership is 31,608."

(J. Edgar Hoover, testifying before a House appropriations subcommittee, January 24, 1952, "Department of State, Justice, Commerce and the Judiciary Appropriations for 1953," p. 174.)

"Communist Party membership in the United States decreased in the past year, J. Edgar Hoover, Director of the Federal Bureau of Investigation, said here today. In an interview with The San Diego Evening Tribune, he stated that figures he was disclosing for the first time showed 24,647 known party members today, a decrease of 6,934 in the year . . .

"New York State was still first in party membership, with 11,695, Mr. Hoover stated. Other state totals he listed included California, 3,521; Illinois, 1,492; Ohio, 1,224; New Jersey, 1,070. No other state had more than 1,000 he said."

(New York Times, August 30, 1952, p. 26, col. 3.)

"The Communist Party today totals an estimated 24,796 members."

(J. Edgar Hoover testifying before a House appropriations subcommittee, February 25, 1953, "Department of State, Justice, Commerce and the Judiciary Appropriations for 1954," p. 137.)

"I . . . have a chart showing the above ground organizational apparatus of the Communist Party of the

United States and how they function down through State, county, sections, clubs and units.

"As of the first of this year there were an estimated 22,663 members of the Communist Party in the United States."

(J. Edgar Hoover, testifying before a House appropriations subcommittee on February 24, 1955, "Department of State, Justice, Commerce and the Judiciary Appropriations for 1956," p. 167).

"The membership of the Communist Party at the present time is estimated to be 20,289 . . .

"Of this membership, 69.11 percent, or 14,022 members, are located in 2 states—New York and California."

(J. Edgar Hoover, testifying before a House appropriations subcommittee on February 1, 1956, "Departments of State and Justice, the Judiciary, and Related Agencies Appropriations for 1957," p. 245.)

The Department of Justice is not only familiar with the exact extent of the Party's membership and its distribution geographically, but it has precise figures on infiltration of trade unions. Mr. J. Edgar Hoover has testified to this effect in Hearings Before a Subcommittee of the Senate Committee on Appropriations:

"The Communists have long advocated working through trade-unions as a means of accomplishing their ends. Forty-eight percent of the membership of the Communist Party is in the basic industry of this country."

("Department of State, Justice, Commerce and the Judiciary Appropriations for 1954," p. 146.)

Further indication of the detailed information of the Department as to the membership of the Party is furnished by its published figures as to the specific national origin of the members, their spouses and parents. Mr. J. Edgar Hoover stated in an interview in the *Pathfinder*, November 5, 1952, p. 8:

> "We recently reviewed the origins of 5,395 of the leading members of the Communist Party. The results were most interesting. Only 411 were Negroes, but of the remaining 4,984, we found that 4,555 or 91½% were either of foreign birth, married to persons of foreign birth, or born of foreign parents, while 56½% of the 4,984 traced their origins either from Russia or her satellite countries."

There can thus be little doubt that the Justice Department has for years had available the exact number of Communist Party members in the labor movement and in the country, as well as the identity of each member. Indeed, Assistant Attorney General James McInerney testified to this effect before a Committee of the House of Representatives as early as 1951:

> "The McCarran Act contemplates the disclosure of membership of the party. We have the party registered, all in our building at the present time. So that the Department of Justice is not going to get anything new when we finally achieve registration, if we ever do. We have them registered now. The only question is, it is not a public registration . . ."

("Department of Justice Appropriations for 1952," Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 82d Cong., 1st Sess., p. 191).

In like vein, Attorney General Brownell asserted in a nationwide radio and television address on April 9, 1954 (within days of petitioner's testimony) that the FBI has "penetrated the inner circle of the Communist Party with undercover informants. The success of the FBI in this regard has been so outstanding that the Communist Party in this country doesn't know which of its Communist members to trust." The information about the Communist Party revealed by the Justice Department over the years indicates that, if anything, the Attorney General's comments were an understatement.